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INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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166	12 from bottom	"sect. 566"	"sect. 565"
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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

THE DEPUTY COMMISSIONER OF RAE BARELI . . . . . } PLAINTIFF;

AND

LAL RAMPAL SINGH . . . . . DEFENDANT.

J. C.*
1884
Nov. 14.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Construction—Mortgage Deed.

In construing any instrument it must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it.

Where a mortgage deed gave an absolute power to the mortgagee to take possession of the whole mortgaged property on non-payment of an instalment when due, and contained another clause directing instead a sale of a sufficient portion to realize the amount thereof, and it appeared that the latter clause could be referred to a contingency, so as not to conflict with the absolute power previously given, *held*, that it must be so construed.

APPEAL from a decree of the Judicial Commissioner (Oct. 31, 1881) reversing a decree of the District Judge of *Rae Bareli* (Dec. 20, 1880) and dismissing the Appellant's suit with costs.

The suit was brought by the Appellant as manager of the *Pindri Ganeshpur* estate, of which *Shahdeo Singh* was the pro-

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C.
1884
DEPUTY COMMISSIONER OF RAE BARELI v. LAL RAMPAL SINGH.

prietor, to enforce a mortgage deed granted to the latter by *Subhao Kunwar*, the late wife of the first Defendant, whereby she pledged to him certain property as security for a debt of Rs.50,000. After her death the property passed successively into the hands of the second Defendant and the first Defendant, against whom accordingly the present suit was brought. The District Judge gave a decree in favour of the Plaintiff for possession of the land. The Judicial Commissioner reversed his decision, holding that, upon the terms of the mortgage deed, the mortgagee was not entitled to possession, but only to realise his security by way of sale. The question for decision was whether his construction of the mortgage document was correct.

The facts of the case and the mortgage deed sufficiently appear in the judgment of their Lordships.

The judgment of the Judicial Commissioner was as follows:—

"The main contention is, whether Plaintiff is entitled to recover possession as decreed, or whether his right to possession is dependent on the mortgagor's consent, leaving him, in the absence of such consent, the ordinary right of realizing the mortgage money by sale.

"He must realize his money by realization of his security. And of the two remedies provided for in the covenant the Respondent mortgagor had the choice, whatever may have been the motives under which the covenant was drawn up and executed.

"The second provision does not merely refer to the detail as to half-yearly settlement of accounts, but refers to the entire covenant; and I see no reason to import rather strained deductions by English Courts of Equity into the plain matter of a deed which anyhow reads straightforward."

Mayne, and *Woodroffe*, for the Appellant, contended that this construction was wrong and that the Plaintiff had under the deed an absolute right to take possession upon default in payment. The option given to the mortgagor in the deed did not necessarily or reasonably extend to cutting down the mortgagee's power to take possession and to making such remedy dependent on the consent of the mortgagor. It applied to the mode in which the debt should be discharged after possession had been taken.

Doyne, and *C. W. Arathoon*, for the Respondent, contended that the mortgagee's right to immediate possession was, by the terms of the mortgage deed, made dependent on the consent of the mortgagor to be obtained after the happening of a breach of promise at the end of some year. The words must be construed according to their natural meaning, and in case of ambiguity that interpretation is to be preferred which is most favourable to the mortgagor.

The Appellant's counsel were not called on to reply.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this case was brought by the present Appellant. The plaint prayed that under the terms of an instrument of mortgage, dated the 10th of March, 1874, possession as mortgagee of thirty-one villages specified in that instrument of mortgage should be awarded to the Plaintiff. At the time of filing the plaint the Respondent *Rajah Rampal Singh* was not in possession of the villages. The person in possession was *Dirgaj Kunwar*, his mother. *Rampal Singh* was made a Defendant on the ground that under the circumstances which were stated in the plaint he was liable to pay the original debt, and was the real owner of the mortgaged villages. *Dirgaj Kunwar* was made a Defendant as being the party in possession. The plaint was filed on the 31st of March, 1880. On the 11th of June, 1880, there were proceedings for mutation of names. It is not necessary to go into the particulars of those proceedings, the result of which was that *Rampal Singh* came into possession, and on the 14th of June, in his written statement in the suit, he defended it as being in possession, and *Dirgaj Kunwar* in fact became no longer a real party to it. The contest is between the present Appellant and *Rampal Singh*. The only question which is now raised is upon the construction of the mortgage of the 10th of March, 1874.

The terms of that mortgage, after reciting particulars shewing how it came to be entered into, are these:—After stating that there was to be a mortgage for Rs.50,000, with a promise to pay it up in five years, from 1875 to 1879, it proceeds,—"Therefore I,

J. C.
1884
DEPUTY COMMISSIONER OF RAE BARELI v. LAL RAMPAL SINGH.

while enjoying sound health and proper senses, do hereby mortgage without possession to the Shahzada, in lieu of Rs.50,000, being the balance of the consideration of the above-mentioned decree, the following villages, as per boundaries given below, situate in the above-named pargana and district, together with all vested and contingent rights, the gross rental of which is Rs.18,253 12*a.* 3*p.*, and the Government revenue, Rs.7986; my husband having gifted them to me by a deed of gift dated the 2nd of June, 1873, with power to sell or mortgage or transfer in every way the proprietary right, and I holding possession thereof: Rajah *Hanwant Singh*, my father-in-law, has also recognised the fact by the decree dated the 7th of September, 1871; and in case of change of heirs from time to time this property cannot be taken out of my possession; and I covenant as follows:—1. I will pay Rs.10,000 per annum at both crops to the Shahzada Sahib, and out of that amount his servants will first deduct the interest, whatever it may come to by calculation, and then credit the balance towards the principal: and in case of any disorder which may cause default in payment of the instalment the servants of the Shahzada Sahib Bahadur, taking complete possession of the mortgaged estate, will hold themselves liable for the payment of the Government revenue, including land revenue and cesses of all sorts, and having first deducted from the savings the cost of making collections at the rate of 10 per cent. on the gross rental on account of the pay of servants, will credit the balance towards the instalment money; at the end of each year, in the months of May, June, November, and December, having made up accounts, they will note the date of realization. Till the time the accounts are made up there will be no claim or objection on my part to set off the interest against the amount collected; on the other hand the amount collected will be considered as amount in deposit." To stop here for the present, there is here a distinct provision that upon default in payment of an instalment the mortgagee by his servants was to take possession of the mortgaged property, and to collect the revenue, and apply it towards the payment of the instalment. The words are:—"The servants taking complete possession." That evidently shews that possession was to be taken, the mortgagee was to have power to take possession on the non-

payment of an instalment. What is said by the District Judge in his judgment is very pertinent to this part of the instrument. He says, "The question involved in the fifth issue now remains to be determined, viz., whether under the terms of the deed of mortgage the Plaintiff is entitled to sue for possession. The words of the deed, so far as they bear upon this point, have been carefully read and considered by me in the original Hindustani, and a literal translation has been given above in this judgment. There is no doubt that there is some ambiguity in the language of the deed. That a breach of the condition as to regular payment of instalment has taken place is not denied on behalf of the defence; but it is contended that such breach having taken place the Plaintiff's only remedy is to sue for the recovery of the mortgage debt, and that the Plaintiff's right to enter into possession was intended to be contingent upon the wish of the mortgagor. For this contention the defence relies upon these words of the deed:—'And if this be not agreeable to me then immediately on the happening of the breach of promise, after the end of the year, they may realize the entire instalment money, &c.' It is contended by the defence that the word 'this' (*yeh*), used in the above sentence, applies to all the preceding conditions in the deed, and that it makes the condition of taking possession entirely dependent upon the mortgagor's wish. But I am of opinion that this is not a fair construction of the Hindustani words as they are used in the deed. The language of the deed shews that the power of obtaining possession on failure of regular and full payment of instalments was given absolutely, the words used being, '*kabya karke*' (having taken possession), and emphasised by the words '*si wakt*,' at once, which, read together, indicate absolute power to take possession." Therefore we have in the first part of this instrument an absolute power on the part of the mortgagee to take possession on nonpayment of an instalment. That this was contemplated is shewn also by the provision at the end of the instrument, which says:—"Should, on the expiry of the term of this instrument, any money remain due, then, till the payment thereof, possession will continue according to the terms herein set out." Then, after the passage which has been read, comes the part upon which the Respondent relies. "If I do not accept this,

J. C.
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then as soon as the breach of promise occurs they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me. Should in any way any objection be raised by me, or by my husband, as between us or in Court, it will be void." The contention on the part of the Respondent is, that these words apply to all the previous part of the deed, and that the mortgagee could not take possession, except at the option of the mortgagor, and if the mortgagor thought fit to say that the mortgagee should not take possession but should realize the amount of the instalment by sale of the villages, that course must be adopted, and a suit for possession could not be maintained. Now the consequence of putting such a construction as that on this part of the instrument would be to make it not consistent with the former part, which gives a power to take absolute possession. The instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. A construction which will give effect to all is that the words, "If I do not accept this" may be referred to the part which immediately precedes that passage, namely, that which provides for the setting off the interest against the amount collected by the mortgagee when in possession. The other construction would not only not give the proper effect to the first part of the instrument, but it would also involve what could scarcely have been contemplated by the parties, viz, that the only security, the only remedy which the mortgagee would have if the mortgagor thought fit to insist upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realize the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lordships' opinion the reasonable construction is that there was an absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and the other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships to be the reasonable

construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgment.

Their Lordships will humbly advise her Majesty to reverse the decree of the Judicial Commissioner, leaving the judgment of the District Judge to stand, and the Respondent will pay the costs of this appeal, and the costs of the appeal in the Court of the Judicial Commissioner.

Solicitor for the Appellant: *H. Treasure.*

Solicitors for the Respondent: *Deane, Chubb, & Co.*

BISHENMUN SINGH AND OTHERS . . . APPELLANTS;

AND

LAND MORTGAGE BANK OF INDIA, LIMITED . . . . . RESPONDENT.

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Nov. 18.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Construction of Decree—Jurisdiction in Execution—Costs.

Case in which it was held that a decree of a District Judge was on its true construction rightly treated as his decree, though in some of its terms it purported to amend a decree of the Subordinate Judge, and was rightly carried into execution by the District Judge. His jurisdiction so to do could not properly be questioned on a mere application to him for postponement of an execution sale.

Costs occasioned by the introduction of unnecessary and irrelevant matter into the record disallowed.

APPEAL from a decree of the High Court (April 8, 1881) affirming a decree of the District Judge of *Bhagulpore* (Nov. 6, 1880), made in certain execution proceedings sued out by the Respondent against the Appellants.

The question at issue was as to the jurisdiction of the Court of the District Judge to execute the decree, the Appellants contending that it was properly executable by the Subordinate Judge.

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The facts appear in the judgment of their Lordships.

The order of the District Judge (Nov. 6, 1880) was as follows :—

"I have to pass orders in the application made yesterday on behalf of the judgment-debtors. The execution proceedings have now been pending for many months, and several attempts have been made from several quarters to prevent execution being obtained. The pleader who now at the very moment of sale comes forward with the objection that the properties can only be sold under the first decree and by the Court which passed that first decree, took a prominent part on behalf of other parties in those attempts.

"The *Land Mortgage Bank* appears to have obtained a decree before the first Subordinate Judge, which, it was found, could not be executed. A suit was brought in this Court to amend the decree, and eventually the amendment was allowed on the strength of a written compromise. It seems to me that the two decrees must be regarded as one passed by this Court, and that the objection to the sale should be disallowed. This appears the course most according with equity. The judgment-debtors are not apparently prejudiced in any way by this Court proceeding to execute the decree. Moreover it may be well argued that it is only the decree of this Court which has validity. The decree of the first Subordinate Judge was found to have no validity as originally framed, and it is only when it becomes, as it were, embodied in the amending decree of this Court that it has any validity. Notwithstanding the words in sect. 278 of Act X. of 1877, 'as if he was a party to the suit,' I am not certain that the present objection, though made by a party to the suit, does not fall within that section. If so, it should be disallowed, because it has been unnecessarily delayed. If not, I think I ought to disallow it, because it has been vexatiously delayed, and this is a good ground of rejection, unless when the judgment-debtors would be unduly prejudiced. The sale will therefore proceed. The decree-holder will have his costs, viz., Rs.32, as connected with this application."

Leith, Q.C., and *C. W. Arathoon*, for the Appellants.

Doyne (*Davey*, Q.C., with him), for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

The question raised in this appeal relates to the propriety of a sale effected on the 6th of November, 1880, under the order of the District Judge of *Bhagulpore*. The Appellants are the judgment-debtors of the Respondents, and the debt was secured by a mortgage. A suit was instituted by the Respondents before the Subordinate Judge of *Bhagulpore*, for the purpose of realising that mortgage, and on the 8th of January, 1877, a decree was made, under which the property comprised in the mortgage was to be sold. Before the sale was effected certain objectors appeared, and then it turned out that the Appellants had assumed to include in this mortgage certain property which, by a previous family arrangement, had passed to other members of the family. But at the same time, and by the same arrangement, the Appellants had received other properties which were not included in the mortgage. The Respondents then instituted another suit, also in the Court of the Subordinate Judge of *Bhagulpore*, for the purpose of bringing within the influence of the mortgage the property which by the family arrangement had been substituted for the property that was professedly mortgaged, but did not belong to the mortgagors. That suit was called up by the District Judge into his Court, and in that suit a decree was made on the 6th of August, 1879, by the District Judge, which has now to be construed.

The decree was made by the consent of the debtors, and the effect of it was this: The Court declared that the substituted properties were fit to be sold by auction in execution of the decree of the creditors (that is the decree of the 8th of January, 1877), and that for the purpose of that auction sale this suit ought to be taken as supplemental to the former suit. Then it directed that the mortgage given by the debtors to the creditors, and the aforesaid decree of the 8th of January, 1877, should be amended according to the previous declaration. Another term

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of the consent decree was that the debtors should have six months time, from the date of the decree in the new suit, for making arrangements for payment of the amount due.

Those were the main terms agreed upon, and embodied in the decree. The six months elapsed, and some time after they had elapsed the creditors, the Respondents, presented a petition for execution of the decree in the second suit. It has been disputed whether it was a petition for the execution of the decrees in both suits. Part of the petition looks one way and part the other, but it may be taken to be, as the Appellants contend that it was, a petition for the execution of the decrees in both suits. Now it is a very odd thing that there is not in this record any copy of the order made upon that petition. All their Lordships find is that an order was made fixing the sale for the 5th of November, 1880, and that an application was made by the Appellants for a postponement of that sale. The application seems to have been made on the very day for which the sale was fixed. The Judge refused that application. The sale took place. The Appellants say they are aggrieved by that sale, and they seek by this appeal in some way to disturb the sale. It is difficult to say what they seek because they now rest their case upon the allegation that the execution proceedings should have been carried into effect by the Subordinate Judge, and that the District Judge had no such power. If so, the order by which the Appellants are aggrieved is the order which was made in answer to the petition for execution, and which ordered the sale; and that order is not appealed from. The order that is appealed from is the order made by the District Judge refusing the application to postpone the sale, which was a totally different question. It would be exceedingly difficult for the Appellants to succeed, even if there were no jurisdiction, because they have never taken the proper course to complain on the ground of want of jurisdiction. They complain only of that which is discretionary in the Judge, of ordering the sale to take place at the time fixed or to postpone it. That is the ground of appeal to the High Court, and the ground of their appeal here.

But their Lordships do not desire to rest their decision upon that point. They think on the point which has been argued at

the bar here, though it is not properly raised by the petition of appeal, that the Appellants have shewn no case for disturbing the order made by the District Judge. It is quite clear that in applying to the District Court for execution of the decree in the new suit the parties must have considered that the decree was one of the District Judge, and to be carried out by the District Judge; and though unfortunately we have not got the order made on the petition for execution, the District Judge himself must have so considered, because he made the order for that sale, and the sole question is whether the decree of the 6th of August, 1879, was the decree of the District Judge.

Now, like other decrees of Indian Courts, this is not drawn in the most artistic form; and it might be open to argument whether in saying the decree of the Subordinate Judge should be amended that decree still remained the decree of the Subordinate Judge; but their Lordships think that, even construing the language of the decree strictly, the better construction is that it was intended the decree should be that of the District Judge, and they think that in point of procedure it was more proper to make it the decree of the District Judge than the decree of the Subordinate Judge. If then it was desired that the Subordinate Judge should execute the decree, there should have been an order made by the District Judge ordering the Subordinate Court to carry the decree into execution. The District Judge did not take that view. He carried his own decree into execution, and their Lordships consider that the decree which he carried into execution drew up into itself the decree of the Court below, and that it was in effect a decree for a sale of the whole of the property which the new suit approved to be the property affected by the mortgage. It may be observed in construing that decree that there is certainly one term in it which applies to the whole property; that which was originally well mortgaged, and that which was substituted into the mortgage, namely, that six months time should be allowed to the Appellants to make arrangements. Their Lordships think that on the broad construction of this decree the sensible view of it is to hold that it was the decree of the District Judge, that it affected the whole property mortgaged, and that his jurisdiction to order execution was clear.

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The result is that the appeal ought to be dismissed, and their Lordships will therefore humbly advise Her Majesty to that effect.

The Appellants must pay the costs of the appeal; but their Lordships observe that in this record, as in many others that come before them, there is matter introduced which could not possibly have any bearing upon the question raised by the appeal. There is a map of the district of *Bhagulpore*, which is nothing but a copy of a public map. It is not an estate map, and even if it were it would be difficult to see how it could bear on the question involved in this appeal. There are also nearly thirty pages of jummabundi accounts, and it is impossible to understand how those could have had any bearing upon the appeal. Therefore, in the taxation of the costs, their Lordships desire that the Registrar shall disallow all such as have been occasioned by the introduction of irrelevant matter.

Solicitor for Appellants: *T. L. Wilson.*
Solicitors for Respondents: *Freshfields & Williams.*

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1884
Dec. 11.

RAMDIN . . . . . PLAINTIFF;

AND

KALKA PERSHAD . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act IX. of 1871, *Sched. ii., Arts.* 65, 132—*Limitation—Remedies of Mortgagee.*

Where a mortgagee sued in covenant and also to enforce his mortgage security, *held*, that under Act IX. of 1871, sched. ii., art. 65, the personal remedy was barred in three years, but that art 132 of the same schedule provided a limitation of twelve years as against the mortgaged property.

CONSOLIDATED APPEAL from decrees of the High Court (Aug. 4, 1881), reversing decrees of the District Judge of *Furuckabad* (Dec. 2, 1880), which reversed decrees of the Subordinate Judge (Sept. 24, 1880).

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The facts appear in the judgment of their Lordships.

Doyne, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

LORD FITZGERALD :—

This is a suit instituted by the mortgagee against the mortgagor. He seeks to enforce a mortgage not under seal dated the 25th of January, 1870, by which certain property was pledged to him for a mortgage debt; he alleges that the Defendant has failed to pay both principal and interest, and prays that the principal and interest may be enforced against the mortgaged property, and also by rendering the person of the Defendant and his other property liable. Therefore, although it is a mortgage suit, there are two distinct remedies sought, one against the mortgaged property, and the other by rendering the other property and the person of the Defendant liable. The Defendant does not dispute the mortgage. He raises no question as to the right of the Plaintiff to have the mortgaged property sold, but he says that the remedy sought against him personally, and against his other property, is barred by the operation of the *Limitation Act* of 1871.

Their Lordships turn then to see what the mortgage transaction was. It is very plain and very simple. The instrument recites the mortgage of certain property for Rs.1300 to the present Plaintiff, that the interest should be at the rate of one per cent. per mensem, and the principal and interest to be repaid at the end of Jeth Sambat 1927. The instrument then says:—"I have received the mortgage money in full. I therefore covenant that if I fail to pay the principal with interest on the promised date the mortgagees will be at liberty to recover through the Court their whole money in a lump sum from me or the mortgaged property." The mortgagor thus gives the mortgagee a pledge of certain fixed immoveable property, and also gives as a further security his personal bond or covenant. A period of nearly ten years elapsed from the time at which the mortgage money with interest

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became payable before the suit was instituted. The question submitted for their Lordships' consideration is, whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force, as against the mortgaged property.

Their Lordships are of opinion that the judgment of the High Court is correct. The Judge of the Primary Court held that the personal demand was barred. The Judge of the District Court held the contrary—that there could be but one period of limitation, and that was a period of twelve years, applicable to the mortgage of fixed property, which carried with it and gave the same twelve years for the enforcement of the personal security. Their Lordships are of opinion that the district Judge is wrong in point of law. There are two remedies distinctly sought in the Plaintiff's petition, the one against the mortgaged property, the other against the person and against the other property of the Defendant. As to the mortgaged property there is now no question. Their Lordships are of opinion that the law of limitation which says a bond for money must be enforced within a certain date applies to the specific demand here for a personal remedy against the Defendant. The Plaintiff can have no personal remedy—his remedy against the person of the mortgagor is barred, but his right remains to enforce his demand against the mortgaged property. As far as personal demands, including simple bonds, are concerned, the language of the Act is plain and clear. Sect. 4 of the Act of 1871 directs that every suit instituted after the period prescribed therefor in the second schedule shall be dismissed. The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation is applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent, and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraces suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immovable property, though it also applies to judgments and recognizances in *India*. But the counsel for the Appellant relied upon the language of the 132nd

article of the second schedule, "For money charged upon immoveable property, twelve years." His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property.

Looking at the previous language with reference to personal suits, and at the language of article 132, their Lordships think great inconveniences and inconsistencies would arise if they did not read the latter as having reference only to suits for money charged on immoveable property to raise it out of that property. That seems to their Lordships what the Legislature intended, and they are therefore of opinion that the decision of the High Court was right.

That being so, their Lordships will humbly advise Her Majesty to affirm the decree appealed from. There being no appearance for the Respondent here there will be no costs.

Their Lordships desire to add that their opinion on this appeal also applies to the separate appeal on the mortgage bond of the 10th of June, 1871.

Solicitor for Appellant: *T. L. Wilson.*

J. C.*
1884
Nov. 20, 21.

THE RAJAH OF PITTAPUR . . . . . PLAINTIFF;

AND

SRI RAJAH ROW BUCHI SITTAYA GARU AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Estoppel—Act X. of 1877, *s.* 13—*Suits relating to different Estates—Practice—Costs.*

In a former suit between the same parties, but relating to different property, an issue as to the fact of an adoption was heard and decided:—

Held, that sect. 13 of the Civil Procedure Code, 1877, barred the trial of that issue in the present suit. An estoppel is binding notwithstanding that the suit which raises it relates to a different property.

Costs occasioned by the introduction into the record of unnecessary and irrelevant matter disallowed.

APPEAL from a decree of the High Court (Dec. 1, 1880), affirming a decree of the Subordinate Judge of *Coconada* (Dec. 19, 1879), which dismissed the Appellant's suit with costs.

The facts are stated in the judgment of their Lordships.

Mayne (*Laing*, with him), for the Appellant, contended that under the special circumstances of the case (there not being identity of subject-matter in the suits) the decree of 1840 did not operate as *res judicata*. The will dealt with two sets of property. He referred to *Barrs* v. *Jackson* (1); *Outram* v. *Morewood* (2); *Brunsden* v. *Humphrey* (3).

Doyne, and *Johnstone*, for the Respondents, contended that as the issue was one that was substantially the same in both cases the suit was barred. Reference was made to sect. 13 of Act X. of 1877; *Soorjomonee Dayee* v. *Suddanund Mohapatter* (4); *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari and Another* (5).

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 2 Sm. L. C. 830; 1 Y. & C. 585, and on appeal 1 Phil. 582.
(2) 3 East, 346.
(3) 11 Q. B. D. 712; 14 Q. B. D. 141.
(4) Law Rep. Ind. Ap. Sup. Vol. p. 212.
(5) Law Rep. 5 Ind. Ap. 149.

Mayne replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is a suit brought by the Appellant *Venkata Row* against the mother and sisters of *Venkata Surya*, deceased, and the object of the suit is to have it declared that the Plaintiff is entitled as reversionary heir of *Venkata Surya* to certain property which he claims in the plaint. In consequence of *Venkata Surya's* having died without a son, the mother succeeded to his property and took a Hindu mother's estate therein, and she has conveyed the estate absolutely to her daughters, who are also made Defendants. *Venkata Surya* was the son of *Buchi Tamayya*, and the Plaintiff is the son of *Venkata Surya Row*. The Plaintiff by his plaint claims as reversionary heir to the property left by the son of the first Defendant, and now in her possession and enjoyment, and he also asks a declaration that the alienation of the property mentioned in the plaint which the first Defendant has made in favour of the second and third Defendants was made without any legal necessity or justifying cause, and is void and inoperative beyond the lifetime of the first Defendant, and that the Plaintiff is entitled as reversionary heir to the portions so alienated.

The case of the Plaintiff is, that *Venkata Row*, the father of Plaintiff, was the brother of *Buchi Tamayya*, the father of *Venkata Surya*, the deceased, and he says he was the brother of *Buchi Tamayya*, because *Buchi Tamayya* was adopted by *Niladri Row*, his father's father. The Defendants contend that the Plaintiff's father and *Buchi Tamayya* were no relations, and that the Plaintiff is estopped from saying that *Buchi Tamayya* was his father's brother; that he was not his brother by birth, and that he has no right to say that he was his brother by adoption, because in a former suit between the father of the Plaintiff and *Buchi Tamayya* it had been conclusively determined, upon an issue raised in a Court of competent jurisdiction, that *Buchi Tamayya* had not been adopted. Thereupon an issue was raised in the present suit, "whether the suit is barred by *res judicata*." The Courts below have both found that the suit is barred by *res judicata*, and

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the Appellant now contends that the judgment of the High Court, which affirmed the judgment of the first Court, ought to be reversed upon the ground that the suit is not so barred. One of the contentions of the learned counsel for the Plaintiff is, that although in the suit between *Venkata Row* and *Buchi Tamayya* it had been found upon an issue raised between them that *Buchi Tamayya* was not the adopted son of *Niladri Row*, still he is not bound by it, because this suit does not relate to the property which is the subject of the present suit. It is true that the former suit did not relate to the same property as that which is the subject of the present suit; but the issue has been tried between them by a Court of competent jurisdiction whether *Buchi Tamayya* was adopted or not. In fact the allegation of the Plaintiff is substantially this: that *Venkata Row* had a right to say that *Buchi Tamayya* was not adopted when the establishment of his adoption would have given him a right to participate in the property of *Niladri Row* to which *Venkata Row* in the former suit claimed to be solely interested; but that the Plaintiff, deriving title through his father *Venkata Row*, has a right to say that *Buchi Tamayya* was adopted when the fact of his adoption would entitle the Plaintiff to inherit property as the reversionary heir of *Tamayya's* son. If ever there was a case in which the law of estoppel ought to apply, it appears to their Lordships that this is such a case.

It appears to their Lordships that the High Court was right in holding that the decision of the Provincial Court in 1840, upon an issue directly raised in a cause which they were competent to try, that *Buchi Tamayya* was not adopted, would have been conclusive against *Venkata Row*, the father of the Plaintiff, and is also conclusive against the Plaintiff himself, who cannot make a title except through his father.

It was contended on the part of the Plaintiff, by his learned counsel, that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position. In the case of *Outram* v. *Morewood* (1) the second action was not brought for the same subject-matter for

(1) 3 East, 346.

which the first action had been brought. The first action was for damages sustained by the plaintiff in consequence of the wife of *Morewood* having entered upon certain mines and taken coal from them before she was married. The wife contended that she was entitled to those mines by virtue of a certain conveyance; but it was found by the Court that the wife was not entitled to the mines, and the Court gave damages against her. Another action was brought subsequently against *Morewood*, who had afterwards married the lady, for a second trespass committed by them upon the same mines, and the question then arose whether the finding in the first suit, with reference to the damages claimed in that suit, was binding upon the two defendants in respect of the damages claimed against them in the second suit. It was held that it was. There were two distinct claims. The damages claimed in the two actions were distinct; the trespasses were distinct, and yet it was held that the decision in the first case with regard to the damages claimed in the first case was binding in the second case as an estoppel, the matter having been conclusively tried between the plaintiff and the defendant's wife when a *feme sole* in the first case.

The case of *Barrs* v. *Jackson* (1) was also referred to, but there the subjects of the two suits were different. In that case it was held that a decision of an Ecclesiastical Court, holding that the plaintiff was a next of kin for the purpose of obtaining letters of administration, was binding in a suit brought in the Court of Chancery for the distribution of the estate. The Ecclesiastical Court decided that the plaintiff was a next of kin for the purpose of having administration and managing the property. Subsequently the question was raised in the Court of Chancery whether he was a next of kin for the purpose of taking a share of the property. Those were perfectly distinct claims. Yet it was held that inasmuch as the Ecclesiastical Court would have had concurrent jurisdiction with the Court of Chancery to try the question with respect to distribution, the decision of the Ecclesiastical Court between the same parties with reference to administration was binding upon the Court of Chancery with reference to distribution. The learned Vice-Chancellor *Knight Bruce* had held

(1) 2 Sm. L. C. 805.

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that it was not binding, but his decision was overruled by the Lord Chancellor, who held that it was binding.

Certain remarks of the Vice-Chancellor *Knight Bruce* in that case have been referred to, but in their Lordships' opinion they are not applicable to the present case, inasmuch as it depends upon the construction of an Act of the Legislature of *India*. It may be as well to refer to the remarks which were made by their Lordships in the case of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1). The question there was with regard to the construction of the expression "cause of action," in the 2nd section of Act VIII. of 1859. That Act is not so extensive as the Act of 1877, because it merely declares that a second trial shall not take place upon a cause of action which has already been decided. The question arose as to what was the meaning of cause of action in that section, and it was there said, "Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense, but however that may be by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot in their opinion be tried again in another suit between them." The point here has been determined in the first suit. It was there determined that the Plaintiff's father and *Buchi Tamayya* were not brothers, because it was found that *Tamayya* had not been adopted. In the present suit the Plaintiff says the parties to the first suit were brothers, and the Court below have held that he is estopped from saying that they were brothers because it was determined in the former suit that they were not brothers.

The Act which governs the present case is the Procedure Code of 1877, by sect. 13 of which Act it is enacted that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they, or any of them, claim, litigating under the same title." The issue which was tried in the former suit in this case was whether *Buchi Tamayya*

(1) Law Rep. 2 Ind. Ap. 285.

was adopted by *Niladri Row*, and the issue which the Plaintiff wishes to try in the present case is the same, whether *Buchi Tamayya* was the adopted son of *Niladri Row*.

Their Lordships are clearly of opinion that the issue which was tried in the former suit is the same as that which the Plaintiff wished to be tried in this suit, and that the Plaintiff is estopped from making the allegation which he attempts now to support.

It was contended further, that even if the decision on the issue in the former suit was an estoppel between the parties as to the fact of the adoption of *Buchi Tamayya*, still that estoppel has been got rid of by reason of an arrangement which was afterwards come to by the parties by a razinamah, of which there were two parts. Looking to those documents it appears to be clear that the object of them was not to get rid of the judgment which was passed in the Provincial Court, but, on the contrary, to maintain it. *Buchi Tamayya* was about to appeal against the decision of the Provincial Court to the Sudder Court, and thereupon *Venkata Row* entered into this razinamah, by which he agreed that if *Buchi Tamayya* would withdraw his appeal *Venkata Row* would pay him Rs.30,000. It was further stipulated that if *Venkata Row* should break that agreement and not pay the Rs.30,000, *Buchi Tamayya* should be at liberty to apply to the Court to enforce the payment of the Rs.30,000 in the same way as if *Buchi Tamayya* had obtained a judgment against *Venkata Row* for the amount. But that did not get rid of the judgment of the Provincial Court, in which it was held that *Buchi Tamayya* was not the adopted son, and that he was not entitled to recover the property. It was a judgment intended to prevent *Buchi Tamayya* from proceeding with his appeal and to allow the judgment of the Provincial Court to remain in force. The decision, therefore, of the Provincial Court stands, and being an estoppel between the parties the razinamah does not prevent it from having the effect which would have been given to it if the razinamah had not been entered into.

Their Lordships are clearly of opinion that the High Court was right in affirming the decision of the Lower Court, and thereby holding that the Plaintiff was barred by the finding of the Provincial Court in the suit between his father *Venkata Row* and

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Buchi Tamayya. They will therefore humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss the appeal. The Appellant must pay the costs of the appeal.

Their Lordships wish to make a remark with reference to the record which has been sent up. It appears that over 900 pages of the record have nothing to do with the question raised by the appeal. It is a great abuse for parties to bring before this tribunal a record with 900 pages of documents and figures, none of which have the least bearing upon the case. It does not appear that they were ever proved in the First Court or that they were ever referred to by that Court or by the High Court. The whole of them which were sent by the First Court to the High Court have been incorporated in the record which the High Court has sent up to the Judicial Committee for the purpose of determining this appeal. Their Lordships have frequently called attention to similar abuses, and a circular has been issued directing the High Courts not to send up documents or evidence which have no bearing upon the case. The expenses of this appeal must have been enormously increased by that portion of the record which has been unnecessarily sent up. Under these circumstances their Lordships, in order to prevent a repetition of such an abuse, think it right to direct that the Registrar, in taxing the costs, shall tax them in the same manner as if the record had not contained such parts as the Registrar may consider to have been unnecessarily and improperly introduced into it.

Solicitors for Appellant: *Frank Richardson & Sadler.*
Solicitors for Respondents: *Burton, Yeates, Hart, & Burton.*

RAJAH RUN BAHADOOR SINGH . . . PLAINTIFF;

AND

MUSSUMUT LACHOO KOER . . . . . DEFENDANT.

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Nov. 21, 25, 27, 28, 29; *Dec.* 13.

AND THE CROSS APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res judicata—Act VIII. of 1859, *s.* 2—*Act X. of* 1877, *s.* 13—*Concurrent Jurisdiction—Effect of Grant of Certificate under Act XXVII. of* 1860.

In a suit by a Hindu in the Court of the Subordinate Judge of the district against his deceased brother's widow to recover the estate of the deceased in her possession, where the issue was as to separate or joint ownership of the brothers, *held*, that the grant of a certificate to the widow under Act XXVII. of 1860, after a determination of the same issue as above against the surviving brother, being a proceeding of representation, not otherwise of title, did not constitute *res judicata* in her favour.

Held, further, that a similar determination of the said issue on the intervention of the Plaintiff in a rent-suit brought by the widow in the Moonsiff's Court, did not, under Act VIII. of 1859, s. 2, constitute *res judicata* in her favour, the said Court being one of a limited jurisdiction, and not concurrent with that of the Subordinate Judge.

Krishna Behari Roy v. *Brojeswari Chowdranee* (1) followed.

Act X. of 1877, s. 13, is to the same effect, and does not alter the previous law.

The decree of the High Court being erroneously in the widow's favour on the ground of *res judicata*, a cross-appeal by her against a finding in the judgment in favour of joint ownership was unnecessary to enable her to defend her decree on the ground that the Court ought to have decided on the merits in her favour.

APPEAL and cross-appeal from a decree of the High Court, *Pontifex*, and *M'Donell*, JJ. (Aug. 30, 1880), affirming a decree of the Subordinate Judge of *Gya* (Jan. 21, 1878), which dismissed the Appellant's suit.

The Plaintiff is the brother-in-law of the Defendant, the latter being the widow of the Plaintiff's brother *Moorlidur Singh*, who died on the 28th of January, 1872, and the object of his suit was

* *Present*:—LORD FITZGERALD, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 2 Ind. Ap. 285.

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mainly to recover possession of the half share of the entire immovable estate which belonged to the Plaintiff and *Moorlidur*, on the allegation that they were joint in estate down to the death of the latter, and that thereupon the plaintiff became entitled by survivorship.

The Courts below concurred in dismissing the Plaintiff's suit, but did so on different grounds.

The Subordinate Judge was of opinion that though the Plaintiff had intervened in a certain rent-suit brought by the Defendant against tenants of a portion of the lands in suit, and had obtained a decision of the Court of the Moonsiff who tried that suit against him on the same issue as had been raised between the parties in the present suit, the Plaintiff was not, according to the leading decisions of the High Court, concluded thereby, but was entitled to have "an adjudication of his right" to the whole estate in the present suit.

And the Subordinate Judge, going accordingly into the question of fact as to whether the Plaintiff and *Moorlidur Singh* were joint in estate down to the death of the latter, held upon the evidence that there "remained not the least doubt that these two brothers were separate and their business was separate, that there was intent of living separate and carrying on the business separately, and the major part of the property was acquired separately."

He accordingly directed the Plaintiff's suit to be dismissed with costs.

The Judges of the High Court, on the appeal and cross-appeal of the Plaintiff and Defendant, arrived at exactly the opposite conclusions on those two principal issues. They held that the Defendant had failed to prove "an actual separation and partition before the death of *Moorlidur*," and while finding separate enjoyment after his death, explained it by holding that the Plaintiff, "who seems to have been a somewhat easy-going person, was willing that the Defendant should enjoy the eight annas by way of maintenance."

On the issue as to the effect of the adjudication in the rent-suit, the learned Judges were of opinion that, as the Plaintiff had intervened in that suit, and raised the same issue as in the present

suit as to the jointure of the brothers, and as that issue was decided against him "on almost precisely the same documentary evidence," and to a great extent on the same oral evidence as that in the present suit, he was concluded by that decision. And the High Court accordingly directed the Plaintiff's suit to be dismissed, but without costs, as the plea of *res judicata* had not been raised at the commencement of the suit.

From that decision of the High Court, this appeal and cross-appeal were preferred, and consolidated by order of Her Majesty in Council.

The facts of the case appear in the judgment of their Lordships.

The judgment of the High Court upon the issue as to *res judicata* was as follows:—

"Now at the hearing before the Lower Court, and after all the evidence had been taken, the Defendant raised for the first time the plea or defence of *res judicata*. But that plea was overruled by the Lower Court. The circumstances connected with it are as follows:—

"Some time after *Moorlidur's* death, namely, on the 24th of July, 1874, and contemporaneously with her application for a certificate to collect debts as heir of *Moorlidur*, the Defendant instituted a suit against one *Goneshi Roy*, a tenant, for the sum of Rs.53-6-19, due as rent in respect of 8 annas of his holding, on the allegation that 'the food and transactions of *Moorlidur* were separate.'

"Into that suit *Run Bahadoor* chose to thrust himself as an intervener, by petition of objection dated the 13th of August, 1874, asserting that *Moorlidur* was, till his death, joint with him, and asking to be made a Defendant.

"Accordingly an order was passed that he should be made a Defendant; and on the 4th of September, 1874, he filed his written statement as a Defendant in the rent-suit.

"In that written statement he insisted that *Moorlidur* died in a state of commensality; that the mouzah of which the rent was claimed, and several other villages obtained by *Bishen Singh*, the father, were held in the fictitious names of their servants; that no division and separation of family were ever made in any way; and that he, *Run Bahadoor*, since *Moorlidur's* death, had been in

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possession and occupation of the whole of the property left by *Moorlidur*. It may be noticed that in an almost contemporaneous petition filed by the Defendant, the 14th of September, 1874, in the certificate case, she alleged an absolute separation in 1870.

"The rent-suit was heard before a Moonsiff, who in his judgment dated the 6th of January, 1875, after stating *Run Bahadoor's* allegation that he and *Moorlidur* were joint, and that *Moorlidur* died during the community of interest raised the second issue as follows:—

"'Whether before this the Plaintiff or her husband realized the rent of 8 annas separately; or whether the Plaintiff's husband has been receiving the rent in his lifetime jointly with *Run Bahadoor*, and since his death *Run Bahadoor* alone received the rent of 16 annas?'

"Upon that issue the Moonsiff proceeded to adjudicate on the title to the entire mokurruri, under which was held the mouzah, for the rent of which the suit was instituted; and his conclusion was, that the brothers were in possession separately, and that in fact the two brothers were separate.

"It is to be observed that the Moonsiff arrived at this conclusion on almost precisely the same documentary evidence as has been filed, and to a great extent on the oral evidence of the same witnesses as have been examined in the present suit.

"On the 28th of August, 1875, this judgment was affirmed on appeal by the Subordinate Judge. He held that *Bishen Singh*, the father, 'took the mokurruri in the names of *Bunwari Rawat* and *Kewal Rawat* in equal halves; a fact which sufficiently indicates that a moiety was obtained for the benefit of his son *Run Bahadoor*, and a moiety for that of his other son *Moorlidur*.' And that 'the evidence of *Maharani Inderjit Koer*, *Maharana Ram Kishen Singh*, and other witnesses examined, satisfactorily proves that *Run Bahadoor* and *Moorlidur* were, till the death of the latter, separate, each carrying on his affairs and paying revenue of his share of the mouzah apart from the other.'

"The question we have now to determine is, whether these decisions affect the present suit, and the title set up by the Plaintiff, as *res judicata*.

"It is to be observed that only a special appeal could be preferred to the High Court against the judgment of the Subordinate Judge (though as a matter of fact no special appeal was preferred); and that this rent-suit related to only one mouzah, or part of a mouzah, held under one only of the mokurruris.

"But on the other hand, the two mokurruris, though separate, were exactly similar titles; and it has never been part of the Plaintiff's case that different parts of *Bishen Singh's* property are governed by different circumstances. Indeed, the evidence in the rent-suit applies generally to the commensality or separation of the Plaintiff and *Moorlidur;* and that was the issue which the Plaintiff, *Run Bahadoor,* raised by his written statement in the rent-suit.

"With respect to this, the judgment of Lord *Ellenborough* in *Outram* v. *Morewood* (1) seems significant: 'Recovery in any one suit upon issue joined on matter of title is conclusive on the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession.'

"It is necessary, however, for us to examine a few of the Indian authorities upon this subject.

"In a case referred to Sir *Barnes Peacock,* in consequence of a division of opinion in a bench of this Court (2), it was held that the Collector's Court, in a case under the rent-law of 1859, and the Civil Court, were not concurrent Courts; and therefore that a decision by the Collector was clearly not *res judicata* to affect the Civil Court. But while establishing this plain proposition, Sir *Barnes Peacock,* in his judgment, entered into certain ingenious but extra-judicial observations with respect to the doctrine of *res judicata* as applicable or not to Indian Courts. At page 178 he says: 'It is very important also to see what would be the result if the question of concurrency of jurisdiction were put out of the question. It appears to me to be of much more importance in this country than it would be in *England,* that in order to render a judgment between the same parties upon the same point in one

(1) 3 East, 346. (2) 8 Suth. W. R. 175.

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Court conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. If it were not so, the whole procedure as regards appeals might be entirely changed,' meaning, I presume, that different procedures as to appeals might apply to the two cases.

"And again, page 179, he says: 'A bond of very large amount might be set up as an answer in a suit in the Moonsiff's Court, or in a Court of small causes, for a very small amount; but it never could be held that a decision in those Courts as to the validity or invalidity of the bond as a defence to the suit, would be conclusive upon the (District) Judge in a suit brought upon the bond and upon the High Court in a regular appeal from a decree in that suit.'

"And again, 'It is quite clear that in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction *over the matter in the subsequent suit* in which the first decision is given in evidence as conclusive.'

"And again, page 180, 'I should be disposed to say that the English rule of estoppel ought not to be introduced into the Courts of this country. If the question should ever arise before me, I am at present disposed to think that such a judgment is only *primâ facie* evidence, and not conclusive.'

"The last opinion quoted has been expressly overruled by the Privy Council. The other observations, however, raise a serious question. They have not been expressly, but it seems to us they have been impliedly, overruled by the Privy Council, and they also seem opposed to other decisions.

"Now a suit in the Moonsiff's Court must be under Rs.1000 in value. From this decision there is a regular appeal on fact and law to the District Judge or Subordinate Judge, from whom there is only a special appeal on points of law to the High Court, and no appeal at all, except under very special circumstances, to the Privy Council. If, then, the advantages or disadvantages with respect to appeals are to govern the question whether a judgment can be relied on as *res judicata*, it would seem to follow that judgments in cases under Rs.10,000 (and indeed (see sect. 596 of the present Procedure Code), in cases over Rs.10,000, where

concurrent judgments have been given by the original Court and First Court of Appeal, and no substantial question of law arises), would in all cases of Rs.10,000 and upwards be incapable of being pleaded as *res judicata*, because in such last-mentioned cases it would be impossible to predicate that there might not be an appeal to the Privy Council. This, to say the least, would be an extremely shifty and inconvenient principle to act upon, and, as I shall presently shew, has been disregarded by the Privy Council.

"But the Advocate-General has argued, and argued with great force, that the judgment of a Court ought not to have the effect of *res judicata* in a case which that Court was not itself competent to try, being in fact the proposition contained in the third of the above extracts from Sir *Barnes Peacock's* judgment, which seems to require identity, rather than concurrency, of jurisdiction.

"As, for example, in the present case, the Moonsiff having a jurisdiction to try cases only up to the value of Rs.1000, was competent to try the rent-suit against *Guneshi Roy*, but was not competent to try the present suit, nay, would not have been competent to try a suit for *possession* of the mouzah in respect of which rent was claimed. But this contention would in effect make the doctrine of *res judicata* inapplicable to suits tried by Moonsiffs, except in Moonsiffs' Courts,—a result which might possibly be advantageous, but for which we can find no authority. The 2nd section of Act VIII. of 1859 speaks of a Court of 'competent jurisdiction.' Did it mean competent to try the question of title, or competent to try the second suit? The words are, 'competent to try the cause of action.'

"The judgment of the Privy Council (*Khagowlee Singh* v. *Hossein Bux Khan* (1)), refused to consider a Collector's decision *res judicata*, because it 'was not that of a Court competent to adjudicate on a question of *title*.'

"It would seem to be refining too much to confine the doctrine of *res judicata* in *India* to exactly parallel Courts,—to hold that a Moonsiff's judgment on a question of title should only be *res judicata* in a Moonsiff's Court. One result would be, that there would constantly be a preliminary wrangle as to the valuation of the suit. And it does not seem a satisfactory principle that a

(1) 7 Beng. L. R. 679.

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Moonsiff's judgment should be *res judicata*, and an authoritative decision on title in a suit valued at Rs.999, and not so in a suit on the same title valued at Rs.1001.

"More especially would it be a hardship in a case like the present (which is only an example of the general practice in *India*), where the Plaintiff obtruded himself into the rent-suit, raised the very question he raises in this suit, and put the Defendant, who was Plaintiff in that suit, to the same expense and trouble as if the title to the entire property depended on the result.

"In the case of *Soorjomonee Dayee* v. *Suddanund Moha Pattur* (1), the Judicial Committee expressed their opinion that the 2nd section of Act VIII. of 1859 'would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle, *nemo debet bis vexari pro eâdem causâ*.'

"This maxim was the foundation of the decision in *Collier* v. *Walters* (2), and the case of *Flitters* v. *Allfrey* (3) seems to shew that the judgment of a Court *not* competent to try the case in which the judgment is pleaded as *res judicata*, must nevertheless be held to be the judgment of a Court of *competent* jurisdiction within the rule. For in that case, the defendant having complied with the provisions of sect. 39 of 19 & 20 Vict. c. 108, the county court thereupon became *incompetent* to try the case, though otherwise it might, in the absence of the defendant's dissent, have tried it. And the present case especially falls within the wholesome principle expressed in the judgment of that case (page 42).

"It would, in our judgment, be against principle and authority if a party, having tried an experiment in a county court, could, when judgment was against him, proceed again in *another* Court, not by way of appeal, but by merely varying the form of procedure, or forcing the opposite party to proceed for redress in respect of the same question as had been previously litigated, again harass his antagonist for the same cause, and take his chance of success in another Court when he has previously failed in a Court of competent jurisdiction.

(1) Law Rep. Ind. Ap. Supp. Vol. p. 212; 12 Beng. L. R. 315.

(2) Law Rep. 17 Eq. 259, 267.

(3) Law Rep. 10 C. P. 29.

"The 13th section of Act X. of 1877 seems to support this view. For it enacts that no Court shall try any 'issue,' &c., and this section being in a procedure Act, must, we think, be taken to be declaratory of the existing law. We think it clear that the issue of separation was 'directly and substantially' in issue in the rent suit; and though the Moonsiff was not competent to try the present suit, we think he was competent to try, and, at the instance of the present Plaintiff, did try, in the rent-suit, the issue on which the present suit depends.

"Moreover, if the question of advantage or disadvantage in respect to ultimate appeals is to be disregarded, as we think the Privy Council case hereafter referred to shews, then it is important to remember that the rent suit was also tried and decided on regular appeal, both as to law and fact, by the Subordinate Judge, whose Court was a Court competent to try the present suit.

"We do not refer to the Full Bench decision reported in Indian Law Reports, 3 Calcutta, 145, because there, as we have been informed, both decisions were in the Moonsiff's Court, otherwise that case would be conclusive on the question.

"There are, however, two decisions of this Court, in which, being cases instituted in the Court of the Subordinate Judge, judgments of the Moonsiff's Court were regarded as having the *effect of res judicata.* These cases are reported Ind. Law Rep., 3 Calcutta, 705, and 13 Suth. W. R. 64. It is true, as pointed out by Mr. Justice *White* in the case reported in 6 *Henderson's Calcutta* Reports, 318, that in both these cases the Judges were prepared to arrive at the same conclusion on other grounds. But in effect, the question seems to have been substantially settled by the Judicial Committee in the case of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1).

"In one sense, no doubt, the two Courts in that case had identical jurisdiction; for, any suit which the District Judge was competent to try, the Principal Sudder Ameen (now called the Subordinate Judge) was also competent to try, if the District Judge appropriated the case to his Court for hearing. But practically (and this in effect meets the objections of Sir *Barnes Peacock* as to the advantages or disadvantages with respect to

(1) Law Rep. 2 Ind. Ap. 283.

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appeals), and as the matter actually stood, the jurisdictions were not identical. For when a Principal Sudder Ameen tried cases valued at over Rs.5000, the appeal lay direct to the High Court both on fact and law. But when he tried cases under Rs.5000, the appeal lay on law and fact to the District Judge, from whom only a special appeal on points of law lay to the High Court. The fact that the District Judge might have tried the case as an original case, does not prevent the Court of the Principal Sudder Ameen being a Subordinate Court to that of the District Judge in cases under Rs.5000 heard by the Principal Sudder Ameen.

"In the case before the Privy Council, the judgment of the Principal Sudder Ameen in the first suit, as the suit was valued under Rs.5000, went on regular appeal to the District Judge, and from him only on special appeal to the High Court. The judgment of the Principal Sudder Ameen having been affirmed by both Courts, was held to have the effect of *res judicata* upon the second suit, heard primarily by the District Judge, which went up to the High Court on regular appeal, and thence to the Privy Council.

"We think that the rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited, otherwise all the inconvenience and hardships which the rule is intended to obviate, must continue to exist."

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the High Court was wrong in holding that the suit was barred as *res judicata*. It is a mistake to say that the intervention in a rent-suit could give jurisdiction to bind the Plaintiff by the finding there made. A rent-suit was not even a civil suit at all at one time. The title of the landlord is not tried in a rent-suit, but only the tenancy of the tenant. [LORD FITZGERALD:—Has there been any analogous case in an English Court?] *Flitters* v. *Allfrey* (1). Reference was made to sect. 2 of Act VIII. of 1859. The Moonsiff in the rent-suit could not try a question of title; and secondly, the pecuniary limit of his jurisdiction was insufficient. A Court of competent jurisdic-

(1) Law Rep. 10 C. P. 29.

tion means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is pleaded as conclusive; in other words, the Court giving the decision relied upon must have concurrent jurisdiction with that in which the decision is pleaded both as regards the pecuniary limit as well as the subject-matter: see *Mussumat Edun* v. *Mussumat Bechun* (1); *Misir Raghobardial* v. *Rajah Sheo Baksh Singh* (2), which latter case was decided under Act X. of 1877, sect. 13.

Graham, Q.C., and *Doyne*, for the Respondent, contended that the principle of the case in Law Rep. 9 Ind. App. ought not to be extended. It related to a matter purely Indian, and to the custom of the Courts. Reference was made to *Flitters* v. *Allfrey* (3). The questions are whether the Moonsiff had jurisdiction in the former suit to try this issue; and, secondly, whether his decision is conclusive under sect. 2 of Act VIII. of 1859 in a suit brought to try title in a superior Court. The nature of a rent-suit is seen by reference to Act VIII. of 1869 (*Bengal* Council), sects. 33 and 34. Sect. 73 of Act VIII. of 1859 relates to intervention: see *Bengal* Civil Acts, 1871, sects. 20, 21, and 22. In this case the Moonsiff was empowered and bound to try the issue in question, and the Plaintiff, by reason of his intervention, was as much bound as if he had been originally a party. [SIR BARNES PEACOCK:—The jurisdiction must be concurrent.] The *dictum* in *Raghobardial's Case* does not cover this.

Counsel for the Appellant were not called on to reply, but the cross-appeal was directed to be argued.

Graham, Q.C., and *Doyne*, for the Appellant in the cross-appeal.

Cowie, Q.C., and *C. W. Arathoon*, for the Respondent.

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The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case *Run Bahadoor Singh* sued *Mussumut Lacho Koer*, the widow of his deceased brother, *Moorlidur Singh*, to recover

(1) 8 Suth. W. R. 175. (2) Law Rep. 9 Ind. Ap. 197.
(3) Law Rep. 10 C. P. 39.

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possession of the property held by *Moorlidur*, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindu widow's estate in the property. She further maintained that this question had been conclusively determined in her favour in a former suit between her and the Plaintiff.

The Subordinate Judge decided the plea of *res judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into the question of fact, and held that the brothers were joint in estate.

From this decree *Run Bahadoor* has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross-appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res judicata* arose in this way.

After the death of her husband she applied for a certificate, under Act XXVII. of 1860, enabling her to collect the debts of her husband. This application was opposed by the Plaintiff, who set up the case of joint ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as con-

stituting *res judicata*, counsel at their Lordships' bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the Moonsiff against a tenant for the recovery of rent, to the amount of Rs.53. *Run Bahadoor* intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, viz., joint interest and ownership. An issue was framed in these terms:—

"Did the Plaintiff or her deceased husband realize the rent of the 8 annas separately and in a state of separation before this, or did the Plaintiff's husband during his lifetime realize the rent with *Run Bahadoor* jointly, and after him, did *Run Bahadoor* alone receive rent of the entire 16 annas?"

Witnesses were called on both sides, and the Moonsiff decided in favour of the present Defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of the Court of the Moonsiff is limited to Rs.1000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X. of 1859, exclusive jurisdiction was conferred on Collectors to determine rent-suits, with an express limitation of their power in cases of intervention (sect. 77) to determine the "actual receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII. of 1862, s. 33 (of the Lieutenant Governor of *Bengal* in Council), rent-suits were re-transferred to the ordinary tribunals, to be regulated, like other actions, by the Code of Civil Procedure (Act VIII. of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

It has been contended on behalf of the Defendant, that, this being so, the Moonsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the Plaintiff having intervened and raised

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an issue directly involving the question of title, is bound by the judgment.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the Moonsiff is not conclusive.

The Indian Act in force relative to estoppel by *res judicata* was at the time of the institution of this suit Act VIII. of 1859, s. 2, which is in these terms:—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

With reference to this enactment it has been observed by the Board (1):—

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, . . . and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle *nemo debet bis vexari pro eâdem causâ.*"

The same view has since been expressed by this Board (2).

A similar view had been expressed by Sir *Barnes Peacock*, then Chief Justice of *Bengal*, in the well-known case of *Mussamut Edun* v. *Mussamut Bechun* (3).

He there adopted the definition of judgments conclusive by way of estoppel given by *De Grey*, C.J., in the *Duchess of Kingston's Case*, in answer to questions put by the House of Lords:— "The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court," and Sir *Barnes Peacock* proceeded thus to define "concurrent jurisdiction":—

"In order to make the decision of one Court final and con-

(1) *Soorjomonee Dayee* v. *Suddanand Mohapattar*, Law Rep. Ind. Ap. Supp. Vol. p. 221.

(2) *Krishna Behari Roy* v. *Brojesswari Chowdranee*, Law Rep. 2 Ind. Ap. 285.

(3) 8 Suth. W. R. 175.

clusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

This doctrine has been expressly affirmed in a recent case before this Board (1), decided since the judgment appealed against.

It is true that when the suit in this last-mentioned case was brought the governing statute as to *res judicata* was Act X. of 1877, s. 13, which is in these terms:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction, in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs.1600, on a bond for Rs.12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs.5000; the Assistant Commissioner held that the real amount for which the bond was given was Rs.4790, and not Rs.12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgment was not *res judicata* as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir *Barnes Peacock* above quoted, and proceed to observe:—"In their Lordships' opinion it would not be proper that the decision of a Moonsiff upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or adoption; . . . by taking concur-

(1) *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*, Law Rep. 9 Ind. Ap. 197.

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rent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in *India* might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.

Assuming, therefore, that the question of title was directly raised in the rent-suit, their Lordships are of opinion that the judgment in that suit is not conclusive in this.

Having regard, however, to the subject matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, viz., whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of *Moorlidur* the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this country to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgment in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the Moonsiff and the Subordinate Judge, both natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit, in which the Plaintiff set up the same case, was the same; it was the same also, and the case and evidence much the same, in a proceeding before a magistrate requiring the Plaintiff to enter into recognizances to keep the peace. All the native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it.

The following facts require to be stated in order to the understanding of the merits of the case. *Bishen Sing* was the father of the Plaintiff and of *Moorlidur;* the three, together with a

grandson, formed a joint Hindu family. *Bishen* was the reversionary heir to the raj of *Tikari*, the estates appertaining to which had descended to two brothers, *Hetnarain* and *Modenarain*, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died; *Hetnarain* leaving a widow, *Rani Inderjeet*, who adopted a son, *Ram-Kishen; Modenarain* leaving two childless widows. *Inderjeet* (called in the case "the Maharani") had granted to *Bishen* a mokurruri lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or 1861, *Bishen* left his home on a religious pilgrimage, his whereabouts was long unknown, he was vainly sought by his sons, and did not return until about 1868.

During his absence the following occurrences took place. His two sons brought a suit in his name under the alleged authority of an am-mooktarnama from him against the Maharani, her adopted son, and the widows of *Modenarain*, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court on the ground that the am-mooktarnama was not genuine.

The Maharani had, on the mokurruri rent not being paid, seized the property, put it up for sale, and bought it herself.

It is further alleged by the Defendant, and denied by the Plaintiff, that the brothers separated in estate in 1862 or 1863 (Fasli, 1260).

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged in the written statement of Defendant) is not satisfactorily proved; indeed, whatever might have been the desire of the brothers to live and act separately, they could not effect a partition of the family property without the consent of their father; but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances he came to an arrangement

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with the Maharani and *Ramkishen*, which is stated by the Defendant to be as follows:—

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only on his claim in reversion to the 7 annas. And in consideration of this the Maharani and *Ramkishen* were to regrant the land (in the *Patna* district), the subject of the former mokurruri, together with other lands in *Gya*, by another mokurruri. *Bishen*, however, having devoted himself to a religious life, desired to relinquish his property to his sons, whom he described as "men of this world," in equal and separate shares; but according to the inveterate practice of Hindoos desired this to be done in the form of grants to fursidars, one fursidar in each grant to be the servant of and to represent one of his sons, the other fursidar the other son. His reason for this is said to have been to defeat any claim against them by one *Moonshi Amir Ali*, who had advanced them money to conduct the suit which has been mentioned.

In pursuance of this arrangement *Bishen* executed two ladavi ikrarnamas, in very nearly the same terms, on the 2nd of August, 1868.

He therein states that he undertook a long pilgrimage after the death of *Hetnarain*, and proceeds, "Having gone to different tiruths I was so deeply engaged in the worship of God that there remained no knowledge of the circumstances of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by *Ramkishen*, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and *Ramkishen* execute on the same day another ladavi ikrarnama, admitting his reversionary claim to 7 annas.

The mokurruri pottahs follow on the 4th of August, 1868.

That relating to *Gya* confers on *Bunwari Rawat* and *Kewal Rewat* certain property of large extent, "from generation after generation, at the definite and consolidated annual uniform jumma of Rs.1709 in equal shares." That relating to *Patna* is

to the same effect, the grant being to *Mitan Rawat* and *Ducki Rawat.* These grants are made by the Maharani and confirmed by *Ramkishen.* The grantees are household slaves, and it is admitted on both sides that they were fursidars. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the Defendant has been stated, viz., that the two brothers were the real mokurruridars, and were to hold separately.

That of the Plaintiff is that they were the real mokurruridars, and were to hold jointly.

The High Court are of opinion that *Bishen* was the real mokurruridar, a case set up by neither party.

The Defendant called the Maharani, the only surviving principal of the transaction except the Plaintiff, *Ramkishen* having died before the evidence was taken in this suit. But the Maharani and *Ramkishen* had both given evidence for the Defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties their evidence is clear, throughout consistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes :—

"Both *Babu Run Bahadoor Singh* and *Babu Moorlidur Singh* were mokurrurridars in equal shares, *i.e.*, at the time of taking the mokurruri *Babu Bishen Sing* had divided the property to both the above *Babus* in equal shares that the brothers might not fall out with each other, and with this view the name of a man of each of them was entered fictitiously in the mokurruri . . . *Babu Run Bahadoor Singh* and *Babu Moorlidur Singh* were separate, and therefore the name of a man of each of them was mentioned fictitiously."

It is true that the fursidars gave evidence on behalf of *Run Bahadoor,* the more powerful party (as he has acquired by purchase from the widows of *Modernarain* a present interest to the amount of 7 annas in the raj), that they were slaves of *Bishen,* but, in their Lordships' opinion, this evidence cannot countervail the much stronger evidence that each was the slave of one of the brothers.

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The Maharani further states, that *Bishen* had told her that the "two brothers were fighting with each other; he had made a partition between them."

Ramkishen states:—

"At the time of taking the mokurruri, *Babu Bishen Singh* took it in the name of *Kewal Rawat*, servant of *Run Bahadoor Singh*, and in the name of *Bunwari Rewat*, servant of *Moorlidur Singh*. The *Rawats* are not the real parties. *Babus Run Bahadoor Singh* and *Moorlidur Singh* were mokurruridars in equal shares . . . . for this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons."

Again:—

"*Babu Bishen Singh* took the mokurruri for *Babu Run Bahadoor* and *Babu Moorlidur*. At the consultation held on that and other subjects of jumma and the selection of mokurruri mouzahs, *Run Bahadoor* and *Moorlidur* were both present. *Babu Bishen Singh* was the person who actually took the mokurruri."

On being asked,

"How came you to know that *Babu Bishen Singh* made over the mokurruri to *Babus Run Bahadoor* and *Moorlidur?*"

the witness answered,

"I know, having been told by *Bishen Singh* and *Run Bahadoor* and *Moorlidur*."

In other parts of their evidence these statements are in substance repeated.

Run Bahadoor was called as a witness, and although he in general terms denied that there was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which *Ramkishen* alleged he was present, nor did he deny having said to *Ramkishen* what *Ramkishen* deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the Defendant may be set off who deposed that they lived and messed separately.

The evidence of the Maharani and *Ramkishen* is confirmed by *Hafiz Syed Ahmed Reza*, a pleader and zemindar, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says, *Babu Bishen Singh* said, "these men are of the world," therefore according to his wish, the mokurruri was granted to *Run Bahadoor* and *Moorlidur* in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction *Bishen Singh* retired to *Benares*, where he died.

The evidence of the Maharani and *Ramkishen*, though accepted by the sub-Judge, has been discredited by the High Court; that of *Reza*, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and *Ramkishen* the High Court observe, "They, no doubt, have deposed to statements made by *Bishen Singh*, *Run Bahadoor*, and *Moorlidur*, admitting separation; but we think their evidence in this respect, though important, must be taken with very great reserve. They were both witnesses in the rent-suit, and it is not often that in a suit of that character people of their standing come forward to give evidence unless they have a strong feeling in the matter. Reading their evidence we find, in our opinion, a strong bias in favour of the Defendant."

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that *Run Bahadoor* was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit instead of their discredit that they should overcome their reluctance to give evidence in order to protect her. Bias in a witness may be inferred from his being found to misstate facts, from his telling monstrous or improbable stories, or shewing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the Plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the Plain-

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tiff had declared his intention, and instituted a suit, to set aside the compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent-suit, before he had declared such an intention.

With respect to *Syed Ahmed Reza*, the High Court observe:—

"The Subordinate Judge has relied on the following statement by the witness:—'At the time of the execution of the mokurruri there was a talk between *Run Bahadoor* and *Moorlidur*, with respect to the mention of the names of the benami persons, each inquired of the other which of his men would stand benamidar for him. At last the names of those nominated by each of them were entered.' But the Subordinate Judge has failed to consider this gentleman's statement in cross-examination, 'I do not recollect whether I had made a draft of the mokurruri pottah in favour of the Plaintiff and *Moorlidur*. I do not know where that deed was engrossed in stamp, or where it was signed, but several had witnessed it here. When the deed was written and read, I was not at *Tikari* (the place of execution), when the deed was presented to our signature as witnesses there was no mention made as to whose benamidars are the persons whose names are mentioned in the deed.'

"So this gentleman contradicts himself, and though practising as a vakeel, seems wilfully to have followed the too common custom of this country of attesting a deed subsequently and at a different place to its execution."

For these reasons they place no reliance whatever on his evidence.

The High Court suppose *Reza* to have been a witness to one of the mokurruri pottahs, but this is a mistake, he was a witness only to the ladavi ikrarnamas; therefore the accusation of having witnessed a deed where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed they seem by no means irreconcilable. The consultation as to the choice of benamidars must almost necessarily have been before the actual execution of the document, and the witness, speaking of a trans-

action many years ago, may well have meant by "the time of execution of a deed" the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which if his attention had been called to it he might have been able easily to explain.

Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the mokurruri pottahs, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated, or attempted to separate, before, they received the mokurruri grants in severalty and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the pottahs and the death of *Moorlidur*, in February, 1872, it is enough to say that in the opinion of their Lordships the evidence of the Defendant preponderates; proof is given of separate payments by some tenants, and separate receipts and some jumma wasil baki papers are produced by tenants shewing that they held under separate landlords.

Their Lordships cannot concur with the High Court in accusing the Defendant of "manufacturing" certain jumma wasil papers; the rent accounts not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After *Moorlidur's* death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by *Run Bahadoor*, till her application for a certificate in 1874, when for the first time he set up his present case. During that time *Run Bahadoor* only claimed the right to deal with his own half share; he raised money on mortgages of that half share only; he brought several actions in the name of *Ducki Rewat*, his fursidar, in respect of that share

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only, in the plaints to which actions it is stated that the property was held in separate moieties. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed, the High Court find, in agreement on this point with the Lower Court, that after *Moorlidur's* death, the Plaintiff and Defendant enjoyed the property separately. But the High Court explain this by the supposition that "*Run Bahadoor*, who seems to have been a somewhat easy going person, was willing that the Defendant should enjoy the 8 annas by way of maintenance."

An "easy going person," appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is to be observed that this was not his case—that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes, "After the death of *Moorlidur Singh, Run Bahadoor Singh*, for some time considering him separate, took proceedings only in respect of a moiety."

For these reasons, their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property, all point to the conclusion that the brothers were separate at and before the death of *Moorlidur*, that consequently the finding on this question of the Subordinate Judge was right, and that of the High Court was wrong. Therefore, although the Defendant is not entitled to a decree on the issue of *res judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the Defendant has succeeded on the merits of the case, she should have the costs of these appeals and the costs of the appeals to the High Courts.

Solicitor for the Appellant, *Run Bahadoor Singh: T. L. Wilson.*

Solicitors for the Respondent, *Mussumut Lachoo Koer: Watkins & Lattey.*

GUNGAPERSHAD SAHU . . . . . PLAINTIFF;

AND

MAHARANI BIBI . . . . . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act XL. of 1858, *s.* 18—*Powers of Guardian to mortgage—Rate of Interest.*

Where an order of Court under sect. 18, Act XL. of 1858, empowering a guardian to mortgage certain immoveable property of a minor, omitted to specify the rate of interest at which she was at liberty so to do, *held*, that the proper or most favourable construction of the order was, that it authorized a loan at a reasonable rate of interest, and consequently that the High Court was right, there being no proof of necessity or expediency, in decreeing interest at 12 per cent. instead of 18 per cent., as stipulated in the mortgage bond which the guardian had executed.

APPEAL from a decree of the High Court (Jan. 20, 1882), setting aside a decree of the Subordinate Judge of *Mozufferpore* in *Tirhoot* (April 21, 1880), and dismissing the Appellant's suit with costs.

The facts appear in the judgment of their Lordships.

Leith, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the High Court ought to have decreed that interest should be paid at the rate mentioned in the bond. That rate was shewn to have been for the benefit of the minor's estate, and the Respondent had not taken objection to it in her pleadings or in the first Court.

[Reference was made to *Skinner* v. *Orde* (1).]

Cowell, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

The question in this case turns upon the amount recoverable on a mortgage bond which bears date the 25th of March, 1869. The

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 7 Ind. Ap. 210.

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bond was given by *Parbutty Koer*, who is the grandmother and guardian of the Respondent *Maharani Bibi*. The effect of the bond is that security is given on a certain mouzah belonging to the *Maharani Bibi* for the sum of Rs.8000, to be repayable in about a year's time with interest at the rate of 18 per cent. per annum. The Plaintiff has received payment of an amount equal to the principal due upon the bond with simple interest at 12 per cent. per annum, and he had received that amount of payment before he commenced the suit in which this appeal is presented. If therefore 12 per cent. is all that he is entitled to, the suit must altogether fail. If 18 per cent. is what he is entitled to, then there is still a sum due, and he ought to get a decree for that sum.

The Judge of *Tirhoot*, who heard the case originally, was of opinion that, according to the contract, the Plaintiff was entitled to 18 per cent. until the actual time of payment, but, in exercise of the power vested in the Court, he cut down the rate of interest to 3 per cent. from the date of the suit to the date of the decree, and after decree he gave no interest at all. He therefore evidently thought that the transaction was an exorbitant one, and that, where the Court had discretion, it should lower the rate of interest. Up to the date of suit he had no discretion, and he construed the bond as has been stated.

The Defendant in the suit appealed to the High Court, and that Court was of opinion that the Plaintiff was entitled to interest only at the rate of 12 per cent., and inasmuch as, calculating at that rate, he had been wholly paid off, the suit was necessarily dismissed.

The sole question now is as to the additional 6 per cent. claimed by the Plaintiff.

It has been stated that the bond was executed by the grandmother as guardian of the Defendant, who was a minor at the time. The 18th section of Act XL. of 1858, says, that " no such person shall have power to sell or mortgage any immoveable property without an order of the Civil Court previously obtained." The guardian obtained an order of the Court on the 5th of February, 1869, on a petition in which she stated the necessity of taking a loan of Rs.8000. for the purpose of paying some pressing

debts which were then carrying interest at 12 per cent. The order runs in these terms: "That the petitioner be permitted to take a loan of Rs.8000, by mortgage of mouzah *Sahu*, pergunnah *Ahalwara*." That order says nothing whatever about interest on the Rs.8000. It would certainly seem desirable that a Court which has thrown upon it the responsibility of authorizing loans to be raised upon the security of infants' estates should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised, especially in *India*, where the rate of interest bears so very large a proportion to the principal advanced. There may sometimes be difficulties in doing so. There may have been a difficulty in this case for aught we know. At all events the Judge did not do it. Supposing the Judge does not do it, that cannot give to the guardian the power of raising the authorized loan at any rate of interest that the guardian thinks fit. It has been said the guardian might think fit to raise a loan at the rate of 100 per cent. If that were brought to the notice of the Judge, he would probably institute a very rigorous inquiry before authorizing such a loan. On an order of this kind, which authorizes the raising of a principal sum but says nothing about the interest, their Lordships think that the proper construction or, at all events, the most favourable construction to the lender, is that it authorizes a loan at a reasonable rate of interest.

With respect to the judgment of the High Court their Lordships agree with Mr. Justice *Romesh Chunder Mitter* in his construction of the bond. It was made a question how far the bond, on the face of it, provided for the payment of interest—whether up to the date fixed for the payment of the principal, or up to the date of actual repayment? They agree with Mr. Justice *Mitter* in thinking that it provided for payment of interest up to the date of actual repayment.

Mr. Justice *Mitter* then goes on to say "the Plaintiff must shew that the transaction was beneficial to the interest of the minor," and then he examines the whole transaction, and finds that the raising of Rs.8000 at a reasonable rate of interest was beneficial to the interests of the minor, but that the raising at the rate of 18 per cent. was not beneficial. Their Lordships think that when

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an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but apart from any charge of that kind their Lordships think he is entitled to rest upon the order. Therefore, as regards the principal of this loan, it is sufficient for the Plaintiff to say:—"I have got the order of the Court." But when he comes to the rate of interest he has not got the order of the Court; and if he chooses to lend his money without an order that binds the infant's estate, then it is for him to shew that the matter was one of necessity, or of clear expediency for the benefit of the infant's estate. In this case their Lordships fail to find any evidence shewing any such necessity or expediency. They agree with the view taken by Mr. Justice *Mitter* that there is no case made on behalf of the lender to shew that such a loan was for the benefit of the infant's estate. The result is that the Court has recourse to the ordinary rate of interest ruling in that part of the country upon loans on good security, and finding that rate to be 12 per cent. it says that 12 per cent. is the reasonable rate to charge in the present instance.

Another objection has been raised, which has nothing to do with the merits of the case, namely, that this point was not raised upon the pleadings. It certainly does not appear to have been raised on the written statement. It was put at the bar that the point was waived, but there is no trace of waiver; on the contrary, the Defendant seems to have been desirous to raise every point that occurred to her advisers to defeat the claim of the Plaintiff. It does not appear that there was any formal preliminary settlement of issues, but in the judgment it is stated what the points for consideration are; and Mr. *Leith* very fairly said that he would take those points as the issues in the suit. The second of these issues is:—"Whether *Parbati Koer* really executed the bond in suit." That puts into issue the execution of the bond; but then it goes on—"And whether the Defendant is bound to pay off the debt." That puts in issue the validity of the bond, not

only on account of non-execution by *Parbati*, but its validity generally as against the Defendant, and therefore suggests the question whether the Defendant was bound by the acts of *Parbati Koer?* When we come to the appeal the sixth ground of appeal is somewhat more specific than that. The sixth ground is this:—"That your Petitioner is in no way bound by the acts or statements of *Parbati Koer* unless it is proved that those acts were done under necessity and for the benefit of the estate." No doubt that does not distinguish between the principal of the bond, which was covered by the order, and the interest, which was not covered by the order, but it shews that the Defendant was disputing all disputable acts of *Parbati*. On that ground of appeal Mr. Justice *Mitter* addresses himself to the question of necessity, and decides in favour of the Defendant. Now it would be a lamentable thing if an appeal in which their Lordships are clearly of opinion that the High Court were right on the merits of the case were to be determined the other way on the ground that there was some imperfection in the pleadings. It would be lamentable in any case, and especially in *India*, where we know the pleadings are prepared with a considerable amount of looseness. If it could be suggested on the part of the Appellant that practical injustice had been done him by the want of particularity in the pleadings, and by their not having drawn a proper distinction between the principal due on the bond and the interest, however much their Lordships might lament it, they might be compelled to allow the appeal. But no such suggestion can be made. Their Lordships entirely disbelieve that more complete justice could be done in this case than has been done already.

There is another consideration. If this were really a point sprung upon the Appellant by the judgment of Mr. Justice *Mitter* for the first time, it would have been good ground to apply to the Court for a review. But no such application was made; and their Lordships would be very loth to disturb the decree of the High Court upon a technical point of this kind, where the whole matter might have been set right if the High Court had been applied to. Even if the Appellant were to succeed on this point, what could this Committee do? It could only advise Her Majesty to send back the case to be tried upon the question

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whether it was necessary or reasonable to raise this loan at the rate of 18 per cent. The High Court could have done that on review, and if they thought their decree really did injustice no doubt they would have done so. Their Lordships do not feel justified in disturbing the judgment of the High Court under such circumstances.

The result is that this appeal must be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondent: *Barrow & Rogers.*

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Nov. 18, 19; *Dec.* 3, 6, 8.

THAKUR ROHAN SINGH . . . . . DEFENDANT;

THAKUR SURAT SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh sub-Settlement Act, 1866—Landlord and Tenant—Right of Resumption—Absence of under-proprietary Right.

Where the relationship of landlord and tenant is established, the tenant cannot defeat the landlord's right of resumption upon proper notice on the ground that time and undisturbed enjoyment has ripened his holding into a species of ownership, or that he has acquired by prescription a holding such as to entitle him to an under-proprietary right. He must allege and prove his right to remain undisturbed.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (March 19, 1883), reversing a decree of the District Judge of *Fyzabad* (May 6, 1882), and ordering that the Respondent's claim to recover possession of villages *Newada* and *Gadiana* be allowed with costs.

* At the first hearing of this appeal were present LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

At the second hearing were present LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH, and during a portion of the argument, THE LORD CHANCELLOR (the EARL OF SELBORNE).

The main question in the appeal was, whether the Appellant had acquired by prescription a right to hold the villages as against the Respondent by way of under-proprietary right within the provisions of the *Oudh sub-Settlement Act*, 1866.

The facts appear in the judgment of their Lordships.

The Judge held that the Plaintiff was not entitled to obtain possession of the villages from the Defendant, and that the Defendant was not a mere tenant, but a holder with a title to an under-proprietary right. The Judicial Commissioner, on the other hand, held that the Defendant was a mere tenant at will, and liable to ejectment by the Plaintiff.

Sykes, for the Appellant, contended that the Appellant, assuming the *onus probandi* to be upon him, had proved sufficient to have entitled him to a sub-settlement, even if he had been claimant therefor and not a defendant in ejectment. He claimed in consequence to retain the land in suit not as proprietor or as under-proprietor, but as holding at a favourable rent. It had been granted to him in perpetuity at a fixed rate, under an agreement between the talookdar and *Kesri Singh* in lieu of a money compensation for the death of relatives. The Respondent in his plaint alleged that the Appellant was a lessee under a lease for an unlimited, that is an undefined, term; and on that view there was at least a contract followed by continuous possession for fifty-five years. In either case the Appellant was within the rules of the schedule to Act XXVI. of 1866; and he would be entitled on proper application to be maintained in possession. The increase of rent at the regular settlement did not bear on the question of under-proprietary right; he held at a rent which was fixed to be a certain percentage above the Government revenue. [SIR BARNES PEACOCK:—Even if the tenant cannot prove his right to a sub-settlement, still under the Circular Orders of the Government, having the force of law under the *Indian Council's Act*, 1861, may there not be said to be a recognition of a proprietary right. In other words, do you contend that there are two classes of tenants: first, those entitled to sub-settlement; second, those entitled to be maintained in possession as leaseholders?] Yes. Besides, seer and nankar are alluded to in the evidence, and they

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are always attached to proprietary right alone. [SIR BARNES PEACOCK referred to *Mussumat Thukrain Sookjaj Koowar* v. *The Government and Others* (1). Do you contend that the tenant being put off from claiming proprietary right, was allowed to hold at an easier rent; and that, therefore, a right arises under the special circumstances?] Reference was then made to *Kishnanund's Case*, decided by the Privy Council on the 20th of May, 1879; *Rajah Kishen Datt Ram* v. *Rajah Mumtaz Ali Khan* (2); *Maharajah of Bulrampur* v. *Uman Pal Singh and Another* (3); *Gourishahur* v. *Maharajah of Bulrampur* (4); *Sir Maharajah Drig Bijai Singh* v. *Gopal Datt Panday* (5).

Graham, Q.C., and *Woodroffe*, for the Respondent, contended that the concurrent judgments of the Courts below disposed of the present contention of the Appellant, since they found as a fact that *Kesri Singh* did not in 1826 acquire an under-proprietary tenure of the land in suit. The tenure was not its inception, and there was no allegation or proof that it afterwards became by prescription or otherwise, such as to entitle the Appellant to an under-proprietary right. The rules referred to do not relate to this case, which is one of a beneficial lease, terminable at the will of the lessor on proper notice. The Appellant was not even examined to contradict that case. To be entitled to sub-settlement a tenant must shew an under-proprietary right. Reference was made to *Rajah Sahib Perhlad Sen* v. *Doorgapershad Tewari* (6). As regards leases and lessees, see Act XVII. of 1876 *passim*, and especially sect. 52, whereby all grants of leases at a favourable rent, unless confirmed by the Governor-General, or some such authority, are declared liable to resumption by the talookdar, except that they are valid against him during the continuance of the settlement if there is an agreement to that effect. It is impossible to say that because a lease has been granted on favourable terms, and has been in force for a length of time, therefore there is a presumption in favour of its being perpetual.

Sykes replied.

(1) 14 Moore's Ind. Ap. Ca. 112.
(2) Law Rep. 6 Ind. Ap. 156.
(3) Law Rep. 5 Ind. Ap. 225.
(4) Law Rep. 6 Ind. Ap. 1.
(5) Law Rep. 7 Ind. Ap. 17.
(6) 12 Moore's Ind Ap. 331.

The case was subsequently directed to be re-argued.

Sykes, for the appellant, argued as before,—first, that a grant was established by the evidence; second, in the alternative, that a right to a sub-settlement was established; third, that under Act XXVI. of 1866 the Appellant could establish a seer holding; fourth, that he had a right of occupancy at a fixed rent. The same cases were cited as before.

Graham, Q.C., and *Woodroffe*, for the Respondent, were not called upon.

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The judgment of their Lordships was delivered by

LORD FITZGERALD:—

This case is one relating to title to immovable property, and their Lordships think the parties should present their case with some degree of substantial accuracy, and prove it as alleged; in other words, that their Lordships should deal with the case on the allegation and the proof.

The Plaintiff, *Thakur Surat Singh*, seeks to resume his right as to two villages, *Newada* and *Gadiana*. His petition put his case thus:—"That *Thakur Bharat Sing* is the sanad holding talukdar of taluka *Atwa* and *Nasirpur*, which includes the villages of *Newada* and *Gadiana*. According to the sanad granted to him by Government under Act I. of 1869, he possessed all proprietary powers over the said villages, and consequently he has made over in gift to Plaintiff all his taluka under a deed of gift dated 31st August, 1878." The allegation is that *Surat Singh* became the assignee of *Bharat Singh's* rights. The sanad gives him all proprietary rights subject to the rights of occupation, and other rights of parties who were in possession at the time of the grant, and which they might have established either as a matter of under-proprietary right or sub-settlement, or a right to be continued in occupation. So far there is no controversy. He then alleges that the Defendant was lessee of the said villages under a lease for an unlimited term,—(it has been agreed in the course of the argument that "unlimited" is to be read as "undefined")—at an annual jama of Rs.1628, the lease having been granted by

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Thakur Bharat Singh (the donor), whose successor Plaintiff is under the deed of gift." If that were in controversy, their Lordships think there is evidence in the case which establishes that allegation: for whether the holding of the two villages was originally a separate holding of each, or a joint holding for Rs.1454, by the transaction which took place in 1865, at the time of the general regular settlement of *Oudh*, that rent had been increased, under circumstances to which their Lordships will refer, to Rs.1628 for both, without distinction, and would seem to have constituted a tenancy at that date, in 1865, of both villages at the consolidated rent of Rs.1628. The remainder of the petition of the Plaintiff is this. He alleges in substance that he had a right to resume possession; that he gave notice of his intention to resume; and the Defendant denied his right. These facts not being controverted, *primâ facie* established the relation of landlord and tenant between the Plaintiff and *Rohan Singh*, who himself would be the lessee in 1865, and is the successor of the original grantee. Unfortunately there is no written statement on the part of the Defendant, but there is a verbal statement made at the Bar, very much resembling the old Common Law pleading "*ore tenus.*" There is a verbal statement made by Mr. *Sykes*, counsel for Defendant, taken down by the Judge, which is tantamount to this—"I admit your *primâ facie* case, but my case displaces yours, and I will tell you what it is." Accordingly we find that:—"Mr. *Sykes* states the parties are descended from a common ancestor, one *Nuggar Sah*. Defendant's adoptive father, *Kesri Singh*, got the property in dispute"—that is the two villages —"in A.D. 1826 (1233 F.) on a contract from *Gunga Baksh;* that *Kesri* was to hold for ever, at a rental which was a certain percentage above the Government Revenue." Now that is a clear and precise case, and if the Defendant has sustained it in proof, he has a right to succeed here.

Their Lordships have considered the case, in the first instance on the circumstances antecedent to the time, in 1858, when the confiscation of *Oudh* was declared. The main point to consider is, what title the Defendant had immediately before that confiscation. Mr. *Sykes* then, in his statement, adds, "The amount payable during the Nawabi being Rs.1454, at this rate *Kesri Singh*

paid during the Nawabi, and up to 1271–72 F. In 1272 F. (*i.e.* at regular settlement), on the revenue assessment, on the whole talooka being increased, a corresponding increase in the amount payable by *Rohan Singh* was made, bringing the demand up to Rs.1628." With this explanation the rent is said to have been unchanged since 1826. "Prior to annexation *Kesri Singh* had acquired sub-proprietary title in this holding, and maintained that position subsequent to annexation, and through his successor up to date." The parties met before the Judge to discuss the case and settle issues. The Defendant's case was an admission that he had paid rent, and that the Plaintiff was the talookdar to whom he had paid it; and that *primâ facie* imported the relation of landlord and tenant, which carried with it the right to resume possession on proper notice to quit. The Judge very properly said to Defendant:—"The onus is thrown upon you. You allege in answer to that *primâ facie* case that you are a grantee of a particular character, and I proceed now to settle the issues between you." *Ganga Singh* had been the talookdar under the Nawabi, and was the party entitled to the talook at the time of the grant to *Kesri*, and the Plaintiff is the successor of *Ganga*. The two real issues are, "Did *Kesri* in 1826 acquire from *Ganga Singh* an under-proprietary tenure (granted as compensation for death of a relative in battle) in these two 'villages,' subject to payment of a percentage above Government revenue, and is such tenure maintainable under present law?" Then secondly, "Independent of the specific grant alleged, has the holding of *Kesri* been such as to entitle him to an under-proprietary right?" Both issues lay on the Defendant.

Their Lordships would not be inclined to construe these issues adversely to the Defendant as to the terms, proprietary right, or otherwise, but they will consider whether he has established a right to remain as he is, paying the rents for these villages, and to remain there for ever; whether you call it a right to sub-settlement, or an under-proprietary right, or a right not to be disturbed, is not material. If the Defendant has shewn a right to remain there undisturbed by the Plaintiff, their Lordships will give effect to that right.

It is remarkable that though the beginning of this grant is

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shewn, we have not, on either side, a shred of documentary evidence to establish what it was. It is admitted that at its inception there was no writing. No documents, no acconnts, have been produced. This case, extraordinary in its character, rests entirely on the parol evidence of two old witnesses, whose statements are said to be confirmed by the character of the enjoyment. Their Lordships do not find it necessary to consider the law of *Oudh* under the Nawabi. It was said in the course of the argument that under the Nawabi a grant might have been made of the character which the Defendant seeks to set up unevidenced by writing. Their Lordships may entertain doubt as to whether such was the law of *Oudh*, but for the purposes of this case only, they will assume that the law under the Nawabi was as alleged, that is to say, that such a claim as the Defendant sets up might have been established and maintained, though unevidenced by any written evidence, or any writing, or written contract, or grant. It is not pretended that there was any grant in writing; and the Defendant's witnesses gave evidence that there was none. Further, their Lordships cannot forget that the Defendant rests his title to both villages on one and the same grant, in perpetuity, at a rent to be varied at a certain percentage according to the Government revenue.

Their Lordships will first deal with the case of the village *Gadiana*. That came into the possession of *Kesri* in 1838. There is not a word of evidence to establish what the circumstances were connected with the grant of that village. It plainly was not made in respect of the death of the two relatives, for if the statement which is made is to be believed, they died in battle over twelve years before. The grant as compensation in respect of their deaths would have been the grant of *Newada*. No witness tells us any circumstance connected with the grant of *Gadiana*, save that in 1838 *Kesri* got the village of *Gadiana* from *Gunga Baksh* at a rent originally of Rs.400, afterwards increased to Rs.450. The time or circumstances of the increase from Rs.400 to Rs.450 do not appear; *Kesri* continued to hold the village of *Gadiana*. He paid that rent, and was living at the time of the confiscation of 1858. What was *Kesri's* title at the time of the confiscation to the village of *Gadiana?* He got it in 1838. He

had been twenty years in possession. His possession appears to have been the ordinary possession of any person paying rent, that rent having been increased between the time of the original tenure of 1838 and 1858 from Rs.400 to Rs.450. It is said also that light is thrown upon the character of his possession by the fact that he exercised the zemindary rights. The evidence upon that is by no means satisfactory. Nothing precise or specific is shewn; and there is a mass of evidence on the other side, that in that particular district of country it was common for an ordinary lessee, who had no rights beyond those of a lessee, to exercise what are called zemindary rights. Nothing specific, however, is made out.

It appears to their Lordships that, as to *Gadiana*, it would be impossible to come to any other conclusion, consistently with the evidence, than that the allegation of the Defendant that he held this village from 1826, or even from 1838, under a grant for ever at a rent varying only with the amount of the Government revenue, has not been proved. It appears to their Lordships that the case as to *Gadiana* is too plain to admit of discussion or argument; it utterly fails. Their Lordships will subsequently consider what took place after 1858, and see whether it could have conferred upon Defendant any greater right than *Kesri* had in 1858. The case fails as to *Gadiana*. One might say that, failing as to that, the Defendant failed as to the whole of his allegation, but their Lordships would be very slow to bind the Defendant in that way. If he has proved a case which entitles him to be protected from ejectment as to the other village, *Newada*, their Lordships would be prepared to give effect to that right, whatever it may have been; but they cannot shut their eyes to this, that the allegation as to *Gadiana* has wholly failed, and it must reflect, and powerfully reflect, on the case that is made as to *Newada*.

The evidence as to *Newada* consists of the verbal statement of two witnesses, *Myku Lal* and *Jhubbu*. It must not be forgotten that the case of the Defendant is a perpetual grant out and out, once and for all, from generation to generation, of this village of *Newada*, at a certain rent. The evidence shews that the rent originally payable was R.900, and probably an allowance for the chaukidar, subsequently increased, under circumstances to which

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their Lordships will hereafter allude, to Rs.1628, when joined to *Gadiana*. One witness is seventy-five, and the other is eighty years of age, and they make a statement which it was not possible to contradict. *Myku Lal*, aged seventy-five, says, "I knew *Kesri Singh*. He died about a year after the mutiny. He held *Newada* and *Gadiana* till his death. He had held for many years—perhaps fifty years ago from this date. *Rohan Singh*, Defendant, succeeded him." Then he states the circumstances of the fight, in which persons of the name of *Mán* and *Chain* figured. They were Dacoits. There is evidence in the case that those Dacoits were killed, ninety or 100 years ago. The witness then gives an account of the fight in which two relatives of *Kesri* were killed. "On the 11th day (ekadasa) *Bhabuti Singh* offered *Kesri* money for his relations. *Kesri* said he would not take money, but land. *Newada* was at that time waste." That probably means waste and unoccupied—"and so *Bhabuti Singh* placed *Kesri Singh* there, telling him to locate cultivators there, pay the Government revenue, and enjoy the zemindari rights. Since that time *Kesri Singh* alone has exercised rights in *Newada*. He has granted maffi and planted groves. I was servant of *Kesri Singh* for one year when I was twenty years old; I was present in the fight. *Kesri Singh* paid the chaukidar. The patwari's pay came from the talukdar. *Rohan Singh* is own nephew to *Kesri Singh*, who had no son. *Rohan Singh* has succeeded to *Kesri Singh's* property. Defendant takes all proprietary rights in *Newada* and *Gadiana*." Cross-examined, he said:—"Nothing was written by *Bhabuti Singh* in favour of *Kesri Singh*. *Kesri Singh* was to pay the Government revenue; the amount was not stated. I do not know if the village of *Newada* was assessed at all. *Kesri* and *Rohan* did not engage direct with the Government. I cannot say what amount the Defendant and *Kesri* paid the talukdar. The talukdar appointed the patwari and chaukidar." Now it will be observed that the statement made by that witness is not the creation of a holding at a rent; it is the statement of a verbal grant, in which not a word is said about rent: no rent at all of any kind; but he put him in possession with these absolute rights, and he was to pay the Government revenue. That was the sole obligation imposed on him—not at Rs.900—but to pay the

Government revenue. The evidence given absolutely contradicts that case. Their Lordships do not mean to say it contradicts it in this respect, that in some right or other *Kesri* then got *Newada*, but that he got it in the right which this witness describes under such circumstances as that a grant for ever might be implied from it is absolutely contradictory. His statement is, that he was to exercise the zemindary rights and to pay the Government revenue, but no more.

The second witness, *Jhubbu*, says :—"*Kesri Singh* held them till his death, and after him *Rohan Singh*. Defendant *Kesri* first got possession fifty or fifty-five years ago. On the 'ekadasa,' *Bhatubi Singh* came to *Kesri* and offered him some money. This was declined. *Bhatubi Singh* then located him in *Newada*, and told him to get cultivators and enjoy the zemindari rights and pay the revenue," and about a year or two afterwards he got *Gadiana*. The evidence of that witness is in substance the same as the evidence of the other. It shews, if they are to be believed, a grant under circumstances from which fairly some implication might be made of a continuing grant, but which, in its main particulars, is contradicted by the other evidence in the case. It is now proved beyond doubt that, so far from getting the village subject to no rent, *Kesri* was to pay the talookdar Rs.900, with an allowance of Rs.50 to pay the chaukidar, and that he did not pay the Government revenue; at all events there is no evidence that he ever had dealt with the Government. The evidence is that it was subject to a rent of Rs.950, and that rent he paid.

It remains now to consider whether, upon the evidence of these two witnesses, contradicted as it is by the other evidence in the case, and supported only by the alleged exercise of zemindary rights, which have already been adverted to, their Lordships could fairly draw any inference that the village of *Newada* had been granted, or was intended to be granted, by *Gunga Singh*, or his son, to *Kesri* for ever, to hold from generation to generation, at a fixed rent, variable only according to the change that might take place in the Government revenue? Their Lordships would be very willing indeed to draw any reasonable inference in favour of a party who has so long enjoyed certain rights; but what their Lordships are here asked to do is to invent a grant, to define its terms, to define

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the rent not mentioned at the time of the original supposed grant, and further to come to the conclusion that *Kesri* had got a grant for ever. There is nothing intermediate. It is not alleged to be for the life of *Kesri*, or for the life of *Rohan*. It is either an ordinary lease granted by the talookdar to *Kesri*, as a reward for the services of his family, at a rent profitable to him, but with the incident that it might be resumed upon proper notice by the talookdar, or it is a grant for ever. Their Lordships are now asked, in a case where the commencement of Defendant's title is shewn, to invent a grant in all its terms, and convert it into a holding for ever, by the descendants of *Kesri*. Their Lordships feel, dealing with the title of *Kesri* as it stood in 1858, and quite irrespective of the subsequent increase of rent, there are no circumstances from which they could reasonably come to the inference that in 1858, even as to the village of *Newada* alone, *Kesri* had any such title as alleged.

In 1858 came the confiscation of *Oudh;* the result of which was the determination of all existing interests, and taking them into the hands of the Government. But the Government of *India* did not intend any such injustice as an absolute confiscation of those rights. In certain instances, where talookdars or others had been guilty of great crimes, absolute confiscation did take place; but otherwise it was intended, under certain regulations, to settle and restore the talookdars, and to protect, as far as necessary, by sub-settlement, or by some other process, the existing rights of the occupiers. It will therefore be seen how necessary it is to inquire what those rights were at the time of the confiscation; for though in the letter of Lord *Canning* in 1859, and in the subsequent circulars which were issued from time to time, every intention is shewn to do justice to all the parties, and to compel the talookdars to do justice to the occupiers, yet there is nothing to shew any intention to advance beyond what the rights were at the time of the confiscation, and the intention was generally to restore and to protect those rights. The Defendant says: "But I had a right to a sub-settlement of some kind or other." Their Lordships will not at present go into the distinction between a sub-proprietary right or a right to a sub-settlement, and a right to be protected in the occupation which a

person already had, nor bind the Defendant too nicely by those terms; but they will take it that, if he had a right, he might have protected it under the *Act of Settlement of Oudh*, or some one of the circulars and rules which are adopted and confirmed by that Act. He might have protected that right by either getting a sub-settlement or a recognition of his existing title or possession. What took place was this, and it also depends on the evidence of two witnesses. The possession, it is to be observed, was not disturbed by the confiscation. The talookdar remained as he was, and the occupying tenants remained as they were. Then came the Settlement of 1861, which was only temporary. The witness *Canogi* says: "*Rohan Singh*, after the mutiny, wanted to file a petition, but *Bharat Singh* said, 'There will be confusion in the estate; pay what you used to pay,'"—and that in consequence of that he did not file a petition to protect his right, whatever it might have been. Again, a subsequent witness, *Omaid Singh*, says: "At the settlement after the mutiny, *Bharat Singh* came to *Naihra*, and stopped at the well. *Rohan Singh* said the Government called for petitions. *Thakur Bharat Singh* said: 'If you petition, my talooka will be broken up. Do zemindari as hitherto, and remain in the talooka.'" The Defendant relies upon that evidence. *Bharat Singh* was not produced as a witness. There is objection on the part of the high class Hindus to appear as witnesses in a Court of Justice. The more pregnant observation to be made is that this equitable contract, or whatever it is, was made with *Rohan Singh*, on whom the issue lay, whose title, if he has any, may rest upon this altogether; and he is not called as a witness. Their Lordships cannot tell whether he was present at the trial or not, but it strikes them as a very remarkable fact that *Rohan Singh*, the Defendant and party to this alleged agreement, was not called. Well, then, it rests on the conversation represented to have been overheard by two witnesses, nearly twenty years before the institution of this suit, and being uncontradicted, their Lordships would be quite prepared to consider it; but it is obvious it could only take effect to establish such right as *Kesri Singh* had before the confiscation. As has been pointed out, the real point, therefore, for their Lordships to inquire into, is, what title had *Kesri* at the time of the

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confiscation? Their Lordships have been obliged to come to the conclusion upon the evidence that *Kesri* at that time had no more than a lessee's right, subject to resumption at the will of the landlord upon giving proper notice. The view their Lordships take of it is this, putting it in the largest way for the Defendant, that the parties at that time probably did not understand exactly what this sub-settlement or re-arrangement was; that *Bharat Singh*, anxious to get his talook in safety, was unwilling that there should be any petitions; and what he says is substantially this: "It might create disturbance, it might break up the talooka; and whatever rights you now have I will preserve;" and to that extent their Lordships would be fully prepared to give effect to this agreement, if such it can be called, but unfortunately in giving effect to that, they could only give effect to and protect the interest which the lessee had in 1858. The case goes a step farther, because it is alleged that a transaction took place subsequently which established the right of the Defendant to hold these two villages for ever. The allegation in the defence is that there had been an agreement between *Bharat Singh* and the present Defendant; that the Defendant, agreeing to pay an increased rent, should hold two villages for ever at that increased rent. Let us see what that transaction was, and whether, in place of supporting the Defendant's case, it does not go far to destroy it. It is thus described by the two witnesses:—"At the Regular Settlement *Rohan Singh* went to *Hakaura*," (the Regular Settlement was in 1865, four years after the alleged conversation) "being called by *Bharat Singh*, who said that the revenue had been assessed heavy;" not that *Rohan Singh's* was heavy, but that the talookdar's revenue had been assessed heavy; "that he had to pay Rs.1022 on *Newada* and *Gadiana*, and he demanded from *Rohan* Rs.511, Rs.48, for chaukidar, and Rs.47 for patwari; since that *Rohan Singh* has paid Rs.1628." The exact sums are, Rs.1022, Rs.511, Rs.48, and Rs.47; which just make up the Rs.1628. There is not a word said to this effect: "If you will pay the increased rent, I will maintain you in possession." It is the simple case of a talookdar whose payment to the Government had been increased, going to his tenant and saying: "I must now increase your rent. I have to pay more myself, and you

must pay me more," and in addition to paying for the chaukidars he pays for the patwari, and he pays such a sum as, above the Government revenue, and over those two payments, will leave a clear profit of Rs.511 at least going into the hands of the talookdar. But it is not shewn what the increase of Government revenue was. It is not shewn that the increase of rent by Rs.174 had any relation, or what relation, to the increase of Government revenue. It simply shews that the two villages appear to have been consolidated, and that they are held together at a consolidated rent which exceeds by Rs.174 annually what had been paid before. Their Lordships have already stated their view that he had only the title of an ordinary lessee, subject to the acknowledged right of the landlord to resume upon giving due notice. If there was a contract in 1861, it was a contract only to maintain *Rohan Singh* in that which his ancestor had at the time of the settlement, and nothing more; and the transaction of 1865, in place of establishing any title greater than that of an ordinary tenant in *Rohan Singh*, simply shews that he agreed to hold at an increased rent, and without any stipulation that his tenure was to be, as it is now alleged to be, a tenure for ever.

Their Lordships do not consider it necessary to express any opinion on the questions of law which have been raised. The facts of the case establish that the decision of the Judicial Commissioner of *Oudh* was correct, and that the Defendant failed to establish his case upon the facts. Many cases have been cited, and a very interesting argument has taken place upon the effect of the rules and Legislative Acts with regard to confiscation in *Oudh*. Their Lordships have also had these rules illustrated by a number of decisions to which Mr. *Sykes* referred. It appears to their Lordships quite unnecessary to deal with any of those decisions, or any of those cases. This Defendant has not been protected by any sub-settlement. There has been no Government recognition of his right. Their Lordships arrive at the conclusion that he is probably in as good a position as if his right, whatever it was, had been recognised in some way under the rules regulating the settlement of *Oudh*. But what was that right, to which only we can give effect? Their Lordships have

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already pointed out what the right was in 1858, and nothing that has occurred since that has given greater effect to, or increased that right.

Their Lordships therefore think that the decision of the District Judge was erroneous, especially when he says that while holding there was no evidence of any grant, and the evidence entirely failed, he still comes to the conclusion that time and undisturbed enjoyment had ripened this holding into a species of ownership; and again, Defendant had acquired by prescription a holding such as to entitle him to all under-proprietary right. Such propositions are wholly inapplicable to such a case as this, where the origin of the tenancy is shewn at a rent twice increased, and paid down to the commencement of the suit. In such a case, length of enjoyment coupled with the payment of rent can give no greater force to Defendant's right than it originally possessed. Their Lordships have come to the conclusion that the decision of the Judicial Commissioner of *Oudh* was correct. They do not adopt some of his reasons, but they adopt his conclusion.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss this appeal. The costs will be paid by the Appellant.

Solicitor for Appellant: *William Buttle.*
Solicitors for Respondents: *Watkins & Lattey.*

RANI BHAGOTI . . . . . DEFENDANT;

AND

RANI CHANDAN . . . . . PLAINTIFF.

J. C.*
1885
Feb. 7.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Award—General Reference to Arbitration -Effect of Award.

Where two parties had signed a general reference to arbitrators to decide between them upon their respective rights, and on the face of the award it appeared that the arbitrators had inquired into the matters referred, and no ground appeared for saying that they had misconducted themselves or made any mistake in conducting the inquiry:—

Held, that the award was binding.

APPEAL from a decree of the Judicial Commissioner (Nov. 22, 1880), allowing an appeal from a decree of the Additional Commissioner, *Jubbulpore* and *Nerbudda* Division (May 8, 1880).

The facts are stated in the judgment of their Lordships.

Woodroffe, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

In this case the Plaintiff, the younger widow of one *Dhiraj Singh*, who died on the 10th of December, 1875, brought her suit to recover half of the property which had been left by *Dhiraj Singh*. The Defendant was the elder widow of the deceased. The property which was claimed in the suit consisted of twenty-four villages which are specified in the schedule to the plaint. The Defendant pleaded, first, that the matters between the parties had been referred to arbitration by an agreement in writing, and that there was an award of the arbitrators which decided that the Plaintiff was not entitled to recover half of the property. She

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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further pleaded that the Plaintiff was unchaste before the death of her husband, and that therefore she would not be entitled to inherit the share of the property which was claimed.

In the first Court the Deputy Commissioner of *Narsinghpur*, who tried the case, framed several issues, two being whether the question of the distribution of the property of *Dhiraj Singh* had been referred to arbitration, by agreement between the parties in writing, and an award thereon been made, and whether the agreement was binding. Probably it was meant to include in this issue the question whether the award as well as the agreement was binding. Another issue was, whether the Plaintiff was unchaste before the death of her husband, and so debarred from inheriting. In his judgment he said it was doubtful, he thought, whether the Plaintiff did sign the submission to arbitration; but he did not consider that even if she did it was binding, and he gave a decree in favour of the Plaintiff for the half-share of the villages claimed.

That decision went by way of appeal to the Additional Commissioner of the *Jubbulpore* and *Nerbudda* Division, who came to the conclusion that the submission to the arbitration was signed by the Plaintiff. He also held that the award was valid, and reversed the order of the Lower Court and dismissed the plaintiff's claim. He says:—"From a careful consideration of all these circumstances, I cannot agree with the Lower Court that the award of the arbitrators is invalid, or that there is any doubt as to the contract by Plaintiff to refer."

Then the case went by way of what was formerly called a special appeal, but which is now called a second appeal, to the Judicial Commissioner of the *Central Provinces*. The Judicial Commissioner, on that second appeal, had no jurisdiction to deal with any findings of fact. The facts as found by the Lower Appellate Court would have to be taken as being the real facts of the case. However, he did deal with the question whether the agreement was signed and made by the Plaintiff, and he considered that the Lower Appellate Court was fully justified in that finding. But he appears to have thought that he could go into the whole case, because he says:—"I have two questions to decide: first whether the Lower Appellate Court had evidence for the finding

that the agreement was genuine? Secondly, whether it was right in upholding the award?" After finding that the agreement was signed, he went into the question whether the award was to be upheld, and decided that the arbitrators had exceeded their authority in entering into the question of the Plaintiff's chastity, and that the award was bad; and on that ground he reversed the decision of the Additional Commissioner.

The question really now before their Lordships is, whether this award is binding upon the Plaintiff? The submission was made by two agreements, one signed by *Rani Chandan*, and the other by *Rani Bhagoti*, the elder widow. The one signed by *Rani Chandan*, the Plaintiff in the suit, is in these terms: "Agreement executed by younger *Rani Chandan*, widow of *Rao Dhiraj Singh*, late malguzar of *Bilehra* and *Karabgaon*, to *Maharaj Singh* (umpire), malguzar of mouza *Nadia*; *Lala Jaget Singh* (arbitrator), malguzar of mouza *Bamhori*; *Mohanjo Chachandia* (arbitrator), malguzar of mouza *Kathangi*; *Thakur Aman Singh* (arbitrator), thekedar of mouza *Manakpur*; and *Raghunath Seth* (arbitrator), of mouza *Karabgaon*, to the effect that there is a difference between me and the elder Rani about our respective rights; that I have appointed you as arbitrators; that I shall accept what you may give as the limit of my rights." The agreement signed by the *Rani Bhagoti* is precisely similar in its purport.

There is thus a general reference to the arbitrators to decide between the two widows upon their respective rights, and particularly with respect to *Rani Chandan*, the younger, what was the limit of her rights, raising the entire question not merely whether she was entitled to maintenance, but whether there were facts which would disentitle her to succeed to any portion of the estate of her deceased husband. The arbitrators, so far as appears, were gentlemen of some position in the neighbourhood, and apparently must have been well competent to decide such a question as this between the two widows. It may also be observed that probably it was the very best tribunal to which a dispute of this kind could be referred. They make their award, and they say:—"As you, both the Ranis, have appointed us as arbitrators and umpire with your own consent to settle the matter in difference between you

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about your respective rights, we have this day come to your place in order to give our decision. Inquiries being set on foot, *Rani Chandan* stated that she has been living separate, from the lifetime of the deceased *Rao Sahib;* that he, *Rao Sahib*, used to provide for her maintenance to the extent of her requirements; that she is not willing to accept that allowance now; and that some separate allowance for her should be fixed by the arbitrators according to their judgment, so as to avoid the possibility of her being driven to make constant demands against the elder Rani." Then: "Question by Arbitrators.—Why did the *Rao Sahib* keep you separate and fix a maintenance for you? Answer.—I do not know the reason." So they heard what *Rani Chandan* had to say. Then they appear to have heard what the other widow, *Rani Bhagoti*, had to say, and she stated that "*Rani Chandan* has always been living separate; that she will pay what *Rao Sahib* used to pay her (*Rani Chandan*) as maintenance; that the reason why *Rani Chandan* has been living separate is this, that her character has been entirely bad, so much as that she cannot describe it; that she (*Rani Chandan*) is a woman of small intelligence; that for these reasons the *Rao Sahib* at first intended to turn her out, but refrained from doing so to avoid a scandal, and was constrained to keep her separate and to make provisions for her as stated." Then the award says: "On hearing the statement of both the Ranis we inspected the order passed on the proceedings taken for mutation of names."

Those proceedings, it may be well to mention here, were proceedings which had been taken immediately upon the death of *Dhiraj*, and which resulted in *Rani Bhagoti* being found to have been in possession since a date in the deceased's lifetime, and an order for the mutation being made in her favour. The award then goes on: "In that order it is held as proved that the younger *Rani Chandan* has been living separate and receiving maintenance. The statement of the elder Rani was made the subject of full inquiries, and it is proved to be the whole truth and correct, *i.e.*, the old and young people of the village corroborate the elder Rani's statement word by word. The mutation proceedings terminated in *Rani Bhagoti* being put in possession of the estate, and the younger *Rani* being allowed a maintenance."

That was correct. Thus it appears that these gentlemen did make inquiries into the allegation of *Rani Bhagoti*, and the ground which it was alleged disqualified *Rani Chandan* from inheriting any portion of her husband's property. They then go on: "This we opine is quite reasonable and just, and we, the arbitrators, hold that this maintenance is all that can be allowed, save that we consider that a money allowance of Rs.600 per annum be allowed to the younger *Rani Chandan* for her maintenance; that she be allowed to keep her own jewels." They award her that Rs.600 per annum for maintenance.

Now, upon the face of this award, they appear to have inquired into the matters which had to be inquired into to see what the rights of the two widows were, and especially the right of *Rani Chandan*. They decided against her, and there does not appear to be any ground for saying that they misconducted themselves, or made any mistake in conducting the inquiry. The only thing apparently that can be suggested arises from the evidence which one of them, *Jagat Singh*, gave, in which, when he was cross-examined, he seems to have said, in reply to some question which is not given, "How could we give her half when the sirkar had not done so in the Dakil Kharij?"—that is, in the mutation proceedings. He may have given that as some reason in answer to a question put to him, Why did you not give her half when you were making this award? But that is not a sufficient ground for saying there was anything like misconduct on the part of this gentleman, nor is there any other ground upon which their Lordships can say that this award ought not to be held to be a binding award.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the Judicial Commissioner. Consequently the decision that the award is binding which was come to by the Lower Appellate Court will stand, and the Respondent will pay the costs of this appeal.

Solicitors for the Appellant: *Ashurst, Morris, Crisp & Co.*

J. C.*
1884
Dec. 2, 4, 5, 9, 10.
1885
Feb. 14.

FANINDRA DEB RAIKAT . . . . . PLAINTIFF;

AND

RAJESWAR DASS, ALIAS JAGINDRA DEB RAIKAT AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Customs—Retention of Customs at variance with Hindu Law—Custom of Succession by Adoption rejected—Onus Probandi—Invalidity of Gift to adopted Son where Adoption fails—Construction.

Held, with regard to the origin and history of a family, whose estate was in dispute, that although they affected to be Hindus, they were not governed by Hindu law, but had retained and were governed by family customs which, as regards some matters, were at variance with that law.

Held, further, upon the evidence, that the Hindu custom of succession by adoption had not been introduced into it. The *onus probandi* lay on those who alleged the custom, whereas if the family had been subject to Hindu law the *onus* would have lain on those who alleged its exclusion.

The ruling in *Rajah Bishnath Sing* v. *Ram Churn Majmoadar* (1), that even in a Hindu family there may be a custom which bars inheritance by adoption, approved.

Held, that on the true construction of an angikar-patra, whereby the deceased purported to give his property to the respondent "by virtue of his being his adopted son," inasmuch as the adoption was invalid the gift did not take effect.

Nidhoomoni Debia v. *Saroda Pershad Mookerjee* (2) distinguished.

APPEAL from a decree of the High Court (June 24, 1881) whereby a decree of the District Judge of *Rungpore* (Nov. 11, 1879) was reversed and the Appellant's suit dismissed with costs.

The decree of the District Judge declared the Appellant entitled to the dignity of *Raikat Baikantpur*, and awarded him possession of the estates appurtenant thereto with mesne profits from the date of the death of *Jagindra Deb Raikat*.

The nature of the suit and the facts of the case are stated in the judgment of their Lordships.

* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Beng. S. D. A. (1850), p. 20. (2) Law Rep. 3 Ind. Ap. 253.

The Judge of the Court below (Mr. *Beveridge*) found that though the *Baikantpur* family were not originally Hindus, they had gradually adopted Hindu customs, but that even in 1848 the then Raikat could not properly be called a Hindu, or the general Hindu law be taken as furnishing the rule regulating the succession to the estates of the family which had many usages and habits inconsistent therewith; that adoption was contrary to those usages; that, irrespective of the question of custom, as affecting the alleged adoption of *Rajeswar Dass*, it was established upon the evidence that the Respondent, *Rajeswar Dass*, was the only son of his natural father, that he was not given in adoption by his father in 1280, as had been alleged on his behalf, and that in 1284, when *Jagindra Deb Raikat* proclaimed him as his adopted son, he was an orphan whom no one had authority to give in adoption. Having found that the adoption was invalid, the learned Judge found also that by family custom the estates appurtenant to the raj were inalienable, and that, even if alienable, there had been no alienation to the Respondent *Rajeswar* independently of his adoption, and consequently that the adoption failing, all the dispositions dependent thereon fell with it.

The High Court (*Morris* and *Tottenham*, JJ.) on the other hand observed that if the Appellant could succeed in proving the custom which he set up, by which adoption was prohibited in the family, he, as being admittedly the next legal heir to *Jagindra Deb Raikat*, would be entitled to a decree for the estate without further inquiry into the merits of the adoption, or if, without proving the custom, he could prove that the adoption of the Defendant (*Rajeswar Dass*) was otherwise invalid, he would be entitled to a decree, unless it were shewn on the other hand that the Defendant was entitled to retain possession under the angikar-patra. They then proceeded to consider the evidence which had been adduced in support of the custom prohibiting adoption, and having excluded the Principal Sudder Ameen's judgment in the case dated the 21st of August, 1841, and characterized the oral evidence as to the contents of the kyfeut as not being "intrinsically of much value," found that the Appellant had failed to prove that there was any custom in the family entitled to be recognised by the Court, by which a Raikat was prohibited from

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adopting a son. They then held that the adoption was not invalid on either of the grounds urged against its validity, irrespective of family customs.

Cowie, Q.C., and *Woodroffe*, for the Appellant, contended that this judgment was wrong, and that upon the evidence the High Court ought to have found that the *Baikantpur* family had not adopted the Hindu law in its entirety. They were not originally Hindus, and though to a certain extent they had come under Hindu influence they had not adopted and did not observe the Shasters. The family belonged to the *Koch* tribe, and is the elder branch of the stock from which the Raj families of *Kuch Behar*, *Bijni*, and *Pangu* are descended. The zemindary is a very large one, in some respects like a raj. *Kuch Behar* is in the same district. All these rajs are subject to the same customary law. No part of them was under the *Mogul* dominion. After the *East India Company* acquired the dewanny they encroached on these rajs or zemindaries. See *Hunter's* Statistical Account of *Bengal*, vol. x., pp. 748, 402, and 649. The family claim a divine origin, whence they call themselves and are commonly known as *Shibbansas*, or descendants of *Shib*. They did not adopt Hindu law, whether of the *Bengal* or *Benares* school, in its entirety, but have retained and are still governed by many tribal and family customs inconsistent with that law. Among the proved or admitted customs of this family are:—(1), the impartibility of the dignity and estate; (2), the existence of two kinds of marriage, Brahma and Gandharba, and the preferential right of the issue by the Brahma marriage over that of the Gandharba; (3), the succession to the dignity and estates by the eldest of the legitimate sons of equal rank, and in default of sons by the eldest agnate in the senior male line of equal rank according to the last mentioned system of preference; (4), the entire exclusion of females and males deriving heirship through females, such as daughters' and sisters' sons. Under those circumstances the burden of proving that the Hindu law of adoption had been accepted by the family, so as to enable a sonless Raikat to defeat the claim of the next male agnate lay on the Respondents, and was not discharged by them. A former suit occurred between members of this family, and

throws light on its customs and law: see *Pertaub Deb* v. *Surrup Deb Raikut* (1). The evidence established in this case customs of agnatic descent to the exclusion of adopted sons and also the inalienability of the raj and rajgi of *Baikantpur*. Further, there was no adoption proved, a mere agreement between the adoptive father and natural mother did not amount to an adoption. The evidence, moreover, shewed that the Respondent was the only son of his father at the date of his alleged adoption; consequently the gift of him (if any) by his parents in adoption was invalid. [*Leith* admits that the adoption of an only son is contrary to the *Bengal* school of Hindu law.] Inalienability does not involve impartibility: *Narain Khostia* v. *Lokenath Kkostia* (2); *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (3). With regard to the angikar-patra relied on by the Respondent it was invalid, regard being had to the customs of the family. It could not operate so as to deprive the Appellant as the next legal heir to the dignity of the estate appurtenant thereto. According to its true construction, moreover, it did not purport to confer any right on the Respondent irrespective of his adoption. There was no gift to him on the face of the document, except so far as he filled the character of an adopted son, and as the adoption failed, the gift, if any, failed also.

THEIR LORDSHIPS directed counsel for the Respondents to confine themselves to the two questions: (1), whether there was any law or usage by which this family is governed, whereby the respondent could be validly adopted and become entitled to succeed in preference to the Appellant; (2), if there were no such law or usage whether the angikar-patra operated so as to affect the succession.

Leith, Q.C., and *Doyne*, for the Respondents, contended that the onus of shewing that no power to adopt existed in this family lay on the Appellant and had not been discharged. The family was governed by Hindu law. For several centuries they had professed to be under and subject to that law. But as they have

(1) 2 Sel. Rep. 219. (2) Ind. L. R. 7 Calc. 461.
(3) Law Rep. 8 Ind. Ap. 218.

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never been subjected to Mohamedan rule the descent of their estates and the law of the family had, until they were brought under subjection to British dominion and to the jurisdiction of the *East India Company's* Courts, depended in a great measure on force. As is common in the case of ancient and impartible rajs and zemindaries the law of primogeniture prevails, modified by the preference of the sons, if any, of the noble wife, married according to the Brahma form, over those sprung from the inferior unions called Gandharba, &c. The High Court was right in holding on the evidence that this family, which had gradually become Hindu, was governed by the Hindu law, and had shewn their intention to be so governed: *Abraham* v. *Abraham* (1). The necessary inference from the facts of this case is that the family had generally adopted the Hindu customs, and the Appellant had not shewn that the custom of adoption was excepted. Even if he had shewn a custom not to adopt it would be invalid if these were orthodox Hindus. It would not be binding on their consciences. Consequently the adoption of the Respondent, which had been established by the evidence, was valid, and he had a right to succeed as heir to *Jogendra Deb.* Irrespective of the validity of the adoption he was entitled to take *Jogendra's* estate under the terms of the angika-patra. Reference was made to *Nidhoomoni Debya* v. *Saroda Pershad Moorkerjee* (2).

Counsel for the appellant were not called upon to reply.

1885
Feb. 14.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought to recover a large estate called *Baikunthpur*, situated on the north-east frontier of *Bengal*, in the district of *Jalpaiguri*. The largest landed estates in this district are those of *Patgram* and *Boda*, belonging to the Rajah of *Kuch Behar*, and this estate, which became the property of a branch of the *Kuch Behar* family. It is not included in any Sarkár or Mohamedan division of the country, having been only added to *Bengal* since the British assumed the government of the country. From Dr. *W. W. Hunter's* Statis-

(1) 9 Moore, Ind. Ap. Ca. 195. (2) Law Rep. 3 Ind. Ap. 253.

tical Account of *Bengal*, it appears that Rajah *Nilambhur* of *Kamatápur* (now a ruin within the present state of *Kuch Behar*) was the last independent Hindu ruler of the country, and that after his defeat and capture by *Husáin Sháh*, one of the Afghan kings of *Gaur*, in the beginning of the sixteenth century, anarchy prevailed for several years, and the land was overrun by wild tribes from the north-east. Among these the *Koch* came to the front, and founded the *Kuch Behar* dynasty. Of the *Kochs*, Dr. *Hunter* says, in the Statistical Account of *Darjiling*, "this aboriginal tribe first rose into power about the close of the fifteenth or the commencement of the sixteenth century under one *Hájo*, who founded the *Koch* kingdom on the ruins of the ancient Hindu kingdom of *Kámrup*. . . . . The *Koch* raj extended from 88° to 93½° east longitude, and from 25° to 27° north latitude, *Kuch Behar* being its metropolis, and its limits being co-equal with the famous yet obscure *Kámrup* of the *Tántrás*. Brahmanism was introduced among the *Kochs* in the time of *Visu*, *Hájo's* grandson, who, together with his officers and all the people of condition, apostatised to Hinduism. A divine ancestry for the chief was manufactured by the Brahmans. The converts abandoned the despised name of *Koch* and took that of *Rájbansi*, literally, 'of the royal kindred,' and the name of the country was altered to *Behar*." From the account of their manners and customs given by Dr. *Hunter*, it appears that they differ from their Hindu neighbours in various respects. Of the *Baikunthpur* family, Dr. *Hunter* says that "*Sisu*, grandson in the female line of *Hájo*, is the original ancestor of the family. It is generally asserted that he was the son of *Jirá*, the daughter of *Hájo*, but the family themselves allege that he, as well as *Visu* (another grandson of *Hájo*, and the first of the *Kuch Behar* Rajahs who was converted to Hinduism), was not the son of *Jirá* but of her sister *Hirá*, and that his father was the god *Siva*, on which account all the members of the family assume the name of *Deo*, and return no salute that is made to them by any person. *Sisu*, on the conversion of *Visu* to Hinduism, took the title of *Sib-kumár* or young *Siva*. He was appointed hereditary Raikat, or the second person of rank in the *Koch* kingdom and received the *Baikunthpur* estate as an appanage."

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The plaint of the Appellant (the Plaintiff in the suit) states that *Jogendra Deb Raikat*, the possessor of the estate, died on the 10th of March, 1878, without leaving any son of his body, and "therefore, according to the immemorial family custom and practice descending from generation to generation in our Raikat family of *Baikunthpore* and the Shastras, I have acquired an absolute title in all the properties left by him, and I am entitled to recover possession thereof." It then refers to a title by adoption, and under a will and agreement (angikar-patra) made by *Jogendra Deb*, which has been set up on behalf of *Rajeswar Dass*, who was then a minor, but has since become of age and is the Respondent, by *Rani Jagadiswari Debi*, the widow of *Jogendra Deb*. She was sued as the guardian of *Rajeswar* and executrix. This is followed by a paragraph, which says,—"According to the kulachar (family custom) and custom prevailing in our Raikat family from very ancient times and descending from generation to generation, no one among the Raikats is competent to adopt or to alter the line of succession thereby, or by will or any other deed to give away the kingdom and the raj-guddi. According to the said immemorial kulachar, no female also is competent to hold property and the guddi. Consequently the said *Jogendra Deb Raikat* is not, contrary to the above kulachar and custom, empowered to receive in adoption any one competent to hold the property, or to give or alienate the rajgi and the kingdom to the said adopted son or to any other person, either by will or agreement (angikar-patra), or by any other deed. In fact, the above will and agreement (angikar-patra) are contrary to the prevailing family custom, the law, and the Hindu Shastras, and are, indeed, not true." It was contended by the counsel for the Respondent, in the argument of this appeal, that, by the references in the plaint to the Shastras, the Plaintiff admitted that the family was governed by the Hindu law, except where it is modified by custom. Their Lordships do not so construe the plaint. They think the meaning is to insist upon the family custom as being allowed by the Shastras to govern the family. The materiality of this contention will appear when the evidence and the judgments of the lower Courts come to be noticed.

Rani Jagadiswari Debi, the then Defendant, as guardian, by her

written statement did not dispute the heirship of the Plaintiff failing the adoption and angikar-patra, but alleged that *Jogendra Deb* died after receiving *Rajeswar* in adoption, and making over to him all the property moveable and immoveable which belonged to *Jogendra*, and were in his possession, by means of an angikar-patra (agreement) of the 23rd Kartick, 1284 B.S. (7th of November, 1877), and so according to the Hindu law in force and the clear purport of the angikar-patra the Plaintiff had no right to the property claimed. The statement contained other matter in support of this contention, and also asserted that *Jogendra Deb*, on the 28th Cheyt, 1278 (9th of April, 1872), gave permission to his wives to adopt another son if *Rajeswar* was not living at the time of his death, and therefore the Plaintiff's claim for possession ought to be dismissed.

The issues framed by the Court were:—

1. Is adoption contrary to the customs of the *Julpaiguri* family?
2. Was *Rajeswar*'s adoption valid, *i.e.*, was he an only son or not?
3. Had Rajah *Jogendra* power to make away the property of the raj by will, or deed, or gift?
4. Can the power of adoption conferred by the Rajah on his widows be exercised by them, and can a son adopted by virtue of that power succeed to the property?
5. Can the widows hold the property for the adopted son?
6. Is the angikar-patra of the 22nd of Kartick, 1284, a valid document, and one which confers any right on *Rajeswar*?

At the instance of the Defendant this issue was added:—

Can the Plaintiff inherit during the lifetime of *Jogendra's* widows, and can he now sue; also can Plaintiff's claim take effect against *Sarbá Deb's* self-acquired property?

Subsequently the Court added another issue, namely, if *Rajeswar* was adopted, was he adopted in 1280 or 1284 B.S.? The judge of *Rungpore* (Mr. *Beveridge*) before whom the suit came for trial, in the first instance and as on preliminary objections, decided the 4th, 5th, and 7th issues in the Plaintiff's favour, and held that he as heir-at-law was entitled to succeed at *Jogendra's*

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death if his title were not defeated by the adoption of *Rajeswar* or by the angikar-patra in his favour. A quantity of evidence was then produced on both sides, and on the 11th of September, 1879, the judge, in an able and well-considered judgment in which all the material evidence is noticed, decided the 1st, 2nd, 3rd, and 6th issues in the Plaintiff's favour, and gave him a decree. This was on appeal reversed by the High Court at *Calcutta*, and the suit was dismissed with costs.

Their Lordships, after hearing the counsel for the Appellant, desired the Respondent's counsel to address them first upon the questions whether, by the law or usage by which this family is governed, it was lawful for *Jogendra Deb* to adopt a son who would succeed to the estate in preference to the Plaintiff; and if it was not lawful, has the angikar-patra any effect upon the succession to the estate. Having heard these questions argued, they have come to a conclusion which makes it unnecessary for them to hear any argument upon the 2nd issue, namely, whether the adoption of *Rajeswar* was valid.

The first of these questions was raised by the 1st issue, and the judge of *Rungpore* thought that the burden of proof on that issue was upon the Plaintiff. After some introductory matter, he says, "The Plaintiff contends that there are two more customs, namely, one prohibiting adoption;"—the other relates to the alienation of the estate. "The Defendants deny the existence of these two customs. With these remarks I proceed to decide the issue about adoption, as to which of course the burden is wholly on the Plaintiff. The first mode in which the Plaintiff has endeavoured to prove the existence of the custom is by shewing that there never has been an instance of adoption in the family."

The High Court also thought that the onus was on the Plaintiff to prove a custom which prohibited adoption. This appears from the following passages in their judgment:—"The claim of the Plaintiff rested on the allegation that by a kulachar or old family custom no adoption could be made by a member of the Raikat family . . . . If, therefore, the Plaintiff could succeed in proving the custom which he set up by which adoption was prohibited in the family, he, as being admittedly the next legal heir to *Jogendra Deb Raikat*, would be entitled to a decree for the estate

without further inquiry into the merits of the adoption . . . We find ourselves quite unable to agree with the Lower Court on the main questions raised in the suit, viz., as to the existence of a family custom prohibitive of adoption, and as to the insufficiency of the adoption made of the defendant." They said they had no doubt that the family is now governed by the Hindu law.

Looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit. The onus of proving that the adoption was lawful was upon the Defendant, who relied upon it to defeat the Plaintiff's title. If the family was generally governed by Hindu law he might rely upon that, and then the onus of proving a family custom would be on the Plaintiff.

The origin of the family has been already mentioned. The estate after twelve successions was, in 1809, in the possession of *Sarbá Deb*, who had succeeded his father *Jayantá*. His title was disputed by his uncle *Prátap* on the ground that, by the family usage, a brother succeeds a brother in preference to surviving sons. In 1811 *Prátap* brought a suit in the Provincial Court of *Moorshedabad* against *Sarbá*, by the name of *Surrup Deb*, which was decided in 1818 by the Sudder Dewanny Adawlut in favour of the latter. The case is reported in 2 S. D. A. Reports, 250. The judgment states that the right of the Respondent (*Sarbá*) to the estate was clearly established both by the family usage and by the consent of the Appellant. The High Court has referred to this case as shewing that the family was treated as one governed by Hindu law, quoting a passage at p. 251—"the Appellant, moreover, was unable to shew by whom the custom alleged by him so contrary to the Shastras was introduced into the family, at what time, and for what reasons," as the ground upon which the suit was dismissed. This passage immediately precedes the judgment, and seems to be part of the statement of the case. It may have been the contention of the Respondent, but the ground of the decision is stated to be the family usage and consent of the Appellant. In January, 1848, *Sarba* died, and

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Dr. *Campbell*, the then superintendent of *Darjiling*, having on the 14th of January received information of his death from his two dewans, and that it was probable that there would be a disturbance in the household among his sons, went to *Julpaiguri*, arriving there on the 15th. In his report to the Government of *Bengal*, dated the 20th of January, 1848, which is in the evidence in this suit, he says:—

"I shall now record the information I have gained on the spot, under the most favourable circumstances for doing so, of the state of the Rajah's family, &c. It may facilitate decisions regarding it, obviate litigation to the ruin of the family, and tend to early settlement of the mode of properly managing the estate, a point of very great consequence to the quiet of the frontier, and to the satisfactory performance of my own duties. The Rajah's territory forms the northern part of *Rungpore*. It has a frontier along *Bhudtàn* of about fifty miles, and an equal extent with *Sikim*. Of both borders I am in charge, and I have concurrent powers as magistrate in the whole of it."

* * * * *

"The Rajah could not properly be called a Hindu, although ambitious of being considered within the privileged pale. His family is of the *Koch* tribe, now however designated *Rajbungsis*, and affecting to be equal to *Chhettris*, although retaining many usages and habits quite irreconcilable to their pretensions. Probably Hindu law would not be the just medium for a decision on this succession, and I find that the election of the boy has the approval of many people here as a legitimate succession. This may have referred to some previous case in the family, but the formal installation, and the performances of the obsequies by the boy, are considered to raise his claims above all the others. Under the Hindu law I believe that all the sons would be considered illegitimate, in which case the senior Rani might secure a life tenure of the raj."

The Rajah left seven sons, and the boy referred to was *Rajrajendra Deb*, his sixth son. His title was disputed by *Makarand*, the second and favourite son of *Sarbá Deb*, who brought an action under Act XIX. of 1849, and was put into possession by

the Civil Court of *Rungpore*. This was followed by a long litigation, in which *Rajendra* claimed the property on the ground that *Makarand* was illegitimate. It ended in favour of *Makarand*, who remained in possession till his death in 1853, when he was succeeded by *Chunder Shikhur*, the elder of his two sons. He died in 1865, and was succeeded by his brother, *Jogendra*. The report of Dr. *Campbell* appears to their Lordships to be important evidence of the position of this family, and, in their opinion, it shews that, although they affected to be Hindus, they had retained and were governed by family customs which, as regards some matters, were at variance with Hindu law. The evidence of *Makarand*, given when he was Raikat and was examined with reference to a dispute in another branch of the family, supports this view.

The question to be determined being, therefore, what was the custom of the family with respect to adoption, their Lordships will now notice the evidence upon which they have come to the conclusion, without regarding any burden of proof, that it is not lawful for the Raikat to adopt a son who would succeed to the estate. Before doing so it may be observed that in *Rajah Bishnath Singh* v. *Ram Churn Majmoadar* (1), the Sudder Court allowed that, even in a Hindu family, there might be a custom which barred inheritance by adoption, and remanded the case for further investigation on that question.

From the report in the 2 S. D. A. Reports, which has been referred to in the suit as containing a correct history of the family, it appears that, of twelve Raikats who successively had possession of the estate prior to *Sarbá Deb*, three were succeeded by a brother and one by a nephew. Two of them died leaving no sons; one had a son born after his death, and another had a son whose legitimacy was doubtful. Thus, there are two occasions on which, if it was allowed by the custom of the family, it is most probable there would have been an adoption, and one, the case of the posthumous son, where an authority would probably have been given to the widow or widows of the Raikat to adopt a son. There has been no adoption in this family until one which is said to have been made by *Chunder Shikhur*, who was succeeded by his brother *Jogendra*.

(1) Beng. S. D. A. (1850) 20.

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A boy who was named *Porno Deb*, appears to have been taken in adoption by *Chunder Shikhur*, but no ceremonies were performed. The explanation given by the Plaintiff's witnesses is that *Chunder Shikhur*, who was educated at *Calcutta* under the care of the Court of Wards, did not know the family customs when he took the boy, but that he afterwards became acquainted with them. The succession of *Jogendra* is in the Plaintiff's favour, whether *Chunder Shikhur* desisted from completing the adoption or *Porno Deb* was adopted and did not claim to succeed to the estate.

The next evidence is a statement by *Sarbá Deb*. Another branch of the family were the owners of the zemindary of *Panga*, and, some time before 1840, a suit was brought by *Parbut Narain Koer* against *Karinda Narain* and others in the Court of the Principal Sudder Ameen of the district, to obtain possession of it. In that suit it was asserted by the Plaintiff that adoption was contrary to the custom of the *Panga* family. *Sarbá Deb* was asked by the Court to submit a kyfiut (answer to questions) as to the customs in his branch of the family. The record of the suit in which the kyfiut was filed could not be found, and a copy of the kyfiut tendered by the Plaintiff was rejected by the Judge of *Rungpore* on the objection of the Defendant that it was a copy of a copy. The evidence of two witnesses of its contents was then received—*Parbati Nath Roy*, who was at the time of its submission to the Court employed as assistant to the mokhtars of the raikat, and *Gungadhur Das Bukshi*, who then served him as a mohurrir. Their evidence was substantially the same. The former said he made a copy of the kyfiut before it was filed, to be kept in the mokhtar's serishta, which copy had been destroyed when the mokhtar's house was burnt. The latter, who called *Sarbá* the Rajah of *Jalpaiguri*, said he wrote the draft at the dictation of the Rajah, and a fair copy was made and signed and sealed by the Rajah to be filed in Court. "The kyfiut was asked for to ascertain the family custom of the Rajahs of *Panga*, *Behar*, *Bigni*, and *Baikuntpore*. There were ten or twelve questions in that perwana. I do not remember them all. The first question was this, 'Can a son be adopted or not?' The answer to this question was, 'In our family the custom of adopting a son does not prevail; a daughter's son cannot become the rajah; a woman is not an heir;

the rajah cannot in his lifetime give away the rajgi to his son or to anybody else; on the death of the Rajah the eldest of his sons born of his wedded wives succeeds to the rajgi, and in default of a son a uterine brother succeeds to it.' I remember these facts were written." *Bijni* was another branch of the family. The High Court has said the kyfiut must be dismissed from consideration. Their Lordships have carefully considered the reasons which they have given for this opinion, and find themselves unable to agree in it.

A large part of the evidence of the witnesses relates to the adoption of *Rajeswar*. This it is not necessary to consider. Their Lordships will only refer to such of the evidence about the customs of the family as they think has any weight. *Gungadhur Iswar*, the son of a daughter of the paternal uncle of *Sarbá Deb*, said he had heard from *Sarbá Deb* and *Anunt Deb* that an adopted son does not succeed to the properties, that females cannot become heirs, and that the raj cannot be transferred by gift. *Bhabendra Deb Koer*, a great-great-grandson of *Darpa Deb*, a former Raikat, said the family custom was that an adopted son cannot inherit. He had heard of the family custom from his father's kinsman, *Anunt Debi*, and his paternal grandmother *Jasoda Debi*. The Judge says he relied upon this witness partly because he was a near relative of the family, and because he seemed to be speaking the truth; and that it was also very important to notice that he acted upon his opinions. He was appointed by *Jogendra* his chief executor by the last codicil, dated in December, 1877, and declined to act on the ground that the adoption of *Rajeswar* was illegal. This, however, seems to have been because he thought *Rajeswar* had not been properly taken in adoption. *Hari Pershad Dass*, who married *Hareswari*, a daughter of *Sarbá Deb*, said he had heard from his father-in-law of the customs of the family; that if any one of the Rajahs of *Julpaiguri* adopted a son, that adopted son does not succeed to the raj, nor does a female become heir; the Rajahs cannot transfer by gift the raj-guddi or the raj to anybody. *Hara Pershad Dass*, who was a jumma-nuvis in the family during the whole time that *Makarand Deb* was the Raikat, and succeeded his father in the office, said he was twenty-three or twenty-four years old when *Sarbá Deb* died, and used to read and

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write in the serishta for four or five years prior to his death; that there is a difference between a *Rajbungsi* and other Hindus. On the death of the Rajah his eldest son, by his married wife, gets the rajgi; in default of a son by a married wife, the son by a wife married in the gandharba fashion succeeds to the rajgi; as, for instance, *Makarand Deb* got the rajgi though the eldest son *Doorga Deb* was living. *Doorga Deb* was the son of a prostitute; an adopted son does not succeed to the rajgi; a wife cannot succeed as heir-at-law; he had heard of the existence of this family custom from *Sarbá Deb Raikat.* This witness is an honorary magistrate of *Julpaiguri. Nobindra Deb Koer*, one of the Defendant's witnesses, a son of *Doorga Deb*, the eldest son of *Sarbá*, on cross-examination said that adoption was not made nor were the properties obtained by the adopted son; nor is the custom of adoption prevalent; if the Rajah wishes to make a gift of the raj he cannot do so; he can give something for maintenance; no female can succeed as heir. On re-examination, he said he had heard from his father that the adopted son does not succeed to the property. This evidence was not met by any on the part of the Defendant. The High Court reversed the finding of the Judge on the ground that the family is now governed by Hindu law, and it lay upon the Plaintiff to shew that adoption was prohibited by the custom of the family, which they thought he had failed to do. They also, if their Lordships rightly understand their judgment, put out of their consideration, on the ground that it was hearsay evidence, all the statements as to custom made by deceased members of the the family to which the witnesses deposed. They refer to sect. 32 of the *Evidence Act*, but not to sect. 49. The latter section is applicable, and where an ancient family usage is to be proved the statements of deceased members of the family are relevant facts. Their Lordships are, therefore, unable to give to their judgment the weight which it would otherwise have deserved.

To sum up this part of the case, their Lordships find that through sixteen devolutions of the estate there has been no instance of a succession by adoption, though in three instances the circumstances were such as usually move Hindus to make an adoption; that there has been one instance of an attempt at adoption, and that, whatever its exact issue may have been, it

failed to carry away the succession from the collateral heir; that there is a considerable amount of family tradition against the practice; and that of counter evidence there is absolutely none. Whether, if the *Bykunthpur* family were shewn to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom, need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced.

It is now to be determined whether the angikar-patra has any effect upon the succession to the estate. The facts stated in the introductory part of it were disputed, and in their Lordships' opinion some of them were not proved, but for this purpose they may be taken as proved. It is dated the 23rd Kartick, 1284 (11th November, 1877), and is in these terms, *Jagadindra Deb Kumar* being the name given to *Rajeswar* on adoption:—

"To *Jagadindra Deb Kumar.* This angikar-patra, executed in the year 1284 (1877) by *Jogendra Deb Raikat*, zemindar of pergunnah *Baikuntpore*, &c., inhabitant of *Awas* station and zillah *Julpaiguri*, showeth,—

"That your father, the late *Rangu Barua*, in his lifetime and in the presence of his agnatic relations, *Nikomul Barua* and *Nend Barua* and my kinsman *Budden Chunder Das Rajjamata* and others, and also in the presence of the late *Kant Dab Surma*, purohit, gave you away to me for adoption both verbally and under a written deed. I accepted the gift and duly received the son (in adoption); but I have not hitherto made this fact known to any person in the hope that a son may be born to me of my loins. I have in the meantime supported you and educated you. Besides, to provide against the contingency of my dying without leaving behind me any son born of my loins or taken by me in adoption, I, on Cheyt, 1278 (9th April, 1872), executed a will with permission for adoption, wherein I authorized *Srimati Rani Jagadiswari Debi* and *Srimati Rani Jagneswari Debi*, and *Srimati Rani Japeswari Debi* to take sons in adoption, each of these Ranis to exercise this right on the death of the other. Subsequently on 10th Falgoon, 1279 (20th of February, 1873), I executed a codicil to

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that will, and in that codicil I appointed the Ranis as principal executors, and I appointed other men assistant executors to assist the Ranis in the management and protection of the estate during the minority of any son who might be born to me or of any son who may be received in adoption either by me or by the Ranis. At present I am suffering from many diseases, and to this day no son has been born to me of my loins. The body is frail; who can say what [ill] (which God forbid) may befall me. Wherefore I have thought it proper to disclose the fact of my having taken a son in adoption, and accordingly I have received you in adoption this day publicly, agreeably to the gift made by your father, and I made you over to *Srimati Rani Jagadiswari Debi*, who is your sister by your former step-mother. I authorize you by this angikar-patra to offer oblations of water and pinda to me and my ancestors after my death by virtue of your being my adopted son. Moreover you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my dena-pawna (debts and dues), and you and your sons and grandsons shall enjoy and own them agreeably to the custom of the family. During your lifetime, and as long as son or grandson of yours is alive, the Ranis shall not be able to take any other son in adoption under the term of the will. But should you die leaving behind you neither a son begotten of your loins nor an adopted son, and without leaving a permission for adoption (which God forbid), in that case the Ranis may take a son in adoption under the terms of the will, and shall thereby protect the estate."

It appears to have been the opinion of this Committee that such an estate as this of *Baikunthpur* might by family custom be inalienable: *Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayun Deo* (1); *Rajah Udaya Aditya Deb* v. *Jadul Lal Aditya Deb* (2). There is some evidence in this case of a family custom forbidding alienation by gift, and consequently by will, but their Lordships do not propose to enter into the question whether there is sufficient proof of it, as they have come to the conclusion that, as *Jogendra* had no power to adopt a son who would succeed to the estate, it did not pass to *Rajeswar* by the angikar-patra.

(1) 5 Moore, Ind. Ap. 103. (2) Law Rep. 8 Ind. Ap. 253.

Their Lordships feel no difficulty about *Rajeswar* being sufficiently designated as the object of the gift, although the adoption may not be valid. They think the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it. The words are,—"I authorize you by this angikar-patra to offer oblations of water and pinda to me and my ancestors after my death, by virtue of your being my adopted son. Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my dena-pawna (debts and dues), and you and your sons and grandsons shall enjoy them agreeably to the custom of the family." He is to make the offerings by virtue of being an adopted son, and "moreover" he is to become the proprietor. This is to be the consequence of the adoption. In fact the angikar-patra only states what would have happened without it. The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to his "wife *A.B.*," believing the person named to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator. It is difficult to suppose a case similar to the present coming before the English Courts. In *Wilkinson* v. *Joughin* (1), a testator bequeathed his real and personal estate to trustees, upon trust to permit his wife *Adelaide* to receive the net annual income thereof during her life, and after her death, if no child of his should attain twenty-one, or be married, in trust for his stepdaughter *Sarah Ward* (the daughter of the supposed wife) for her absolute use. The supposed wife and the testator went through the ceremony of marriage, she having represented herself

(1) Law Rep. 2 Eq. 319.

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to the testator as, and he having believed her to be, a widow, her husband being then alive. It was held by the Vice-Chancellor that the bequest to her was wholly void, but the bequest to the daughter was valid. This was apparently on the ground of the intention, the Vice-Chancellor saying, "In my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description."

In *Nidhoomoni Debia* v. *Saroda Pershad Mookerjee* (1), a childless Hindu, by his will, directed as follows:—"And as I am desirous of adopting a son, I declare that I have adopted *Koibullo Pershad*, third son of my eldest brother, *Saroda Pershad*. My wives shall perform the ceremonies according to the Shastras, and bring him up, and until that adopted son comes of age those executors shall look after and superintend all the property moveable and immoveable in my own name or benami left by me, also that adopted son. When he comes to maturity, the executors shall make over everything to him to his satisfaction." The ceremonies of adoption had been performed by one of the widows only, and the other brought a suit to recover half of the property. This Committee held that she could not do so, that there was a gift of his property by the testator to a designated person, and it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by *Koibullo* to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. The intention of the testator appears to have been the ground of decision in this case also, but both the words of the instrument and the nature of the property were very different from the instrument and property now in question. In the present case their Lordships are of opinion that it was *Jogendra's* intention to give his property to *Rajeswar* as his adopted son, capable of inheriting by virtue of the adoption, and the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate is not applicable. As the adoption was contrary to the customs of the family and gave no right to inherit, the angikar-patra had not any effect upon the property. It

(1) Law Rep. 3 Ind. Ap. 253.

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is, therefore, unnecessary to decide whether *Rajeswar* was an only son or whether he was duly given in adoption, about which there was the usual conflict of evidence.

In their Lordships' opinion the decree of the judge of *Rungpore* was right, and they will humbly advise Her Majesty to reverse the decree of the High Court, and to dismiss the appeal to that Court, with costs. They order the costs of this appeal to be paid by the Respondent *Jagadindra Deb Raikat.*

Solicitor for Appellant: *T. L. Wilson.*
Solicitors for Respondents: *Barrow & Rogers.*

ABDUL WAHID KHAN . . . . . DEFENDANT;

AND

MUSSUMAT NURAN BIBI AND OTHERS . . PLAINTIFFS.

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Feb. 13, 17; *March* 4.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Mahomedan Law—Vested Estates in Remainder—Deed of Compromise.

Mahomedan Law does not recognise vested estates in remainder.

Where a deed of compromise between a Mahomedan widow and the sons of her deceased husband stipulated that the former should remain proprietor, and that the latter should be entitled to succeed, *held*, that the title to succeed must be contingent upon the sons surviving the widow, and that it would be opposed to Mahomedan Law to hold that the deed created in them vested interests which passed to their heirs on their death in the lifetime of the widow.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Aug. 24, 1882), reversing a decree of the District Judge of *Rae Bareli* (June 30, 1881), which dismissed the Respondents' suit to recover possession of an 8*a.* 7*p.* share of talookas *Audari* and *Lewana*, and in lieu thereof decreeing to the Respondents possession of a 7*a.* 11*p.* share of the said talookas.

The question decided in the appeal was as to the legal effect under Mahomedan Law of a certain agreement of compromise

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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made between Mahomedans represented by the parties to the appeal, and dated April 28, 1866.

The circumstances which led up to that compromise and resulted from it, and the proceedings in the suit, are sufficiently set out in the judgment of their Lordships.

The judgment of the District Judge (Mr. *Saiyid Mahmoud*), so far as material, was as follows:—

"The parties being Sunnis, the suit is governed by the Hanafea school of Mahomedan Law. It is necessary to consider the nature of the rights conferred by the compromise of the 28th of April, 1866, on *Abdus Subhan* and *Abdul Rahman*. The terms of that compromise are contained in two applications of that date, one filed by *Abdus Subhan*, and the essential part of which may be literally translated thus:—

'I, executant, put it down in writing that my mother, the Defendant, may remain during her lifetime, as hitherto, proprietor and possessor of the said taluka, and may manage the ilaka through karindas (agents). But without necessity with the especial view of destroying my rights she may not alienate any property, and after her death I, executant, and my elder brother *Abdul Rahman*, may become possessors and appropriators of the ilaka, situate in the districts of *Sultanpur* and *Partabgarh*. And during the life of the Defendant I shall not disobey her in any way.'

"The material parts of the corresponding application, made by *Gauhar Bibi*, on the same day, is in these words, which may be literally translated thus:—

'I, executant, with a view of foresight, have settled in this manner, that during my lifetime I myself continue possessor and and proprietress as hitherto, and manage the said taluka through karindas (agents) and without necessity, with a special view of destroying the rights of these two young men, I may not alienate any property of the ilaka situate in the districts of *Sultanpur* and *Partabgarh*. After my death the two young men, *Abdul Rahman Khan* and *Abdus Subhan Khan*, are both heirs and owners of the whole ilaka, they may both become in half shares possessors and appropriators.'

"From these words in the applications it is clear to my mind that the parties to the compromise intended that *Gauhar Bibi* should continue to be the proprietress and possessor of the estate as before, without any limitations or restrictions which would divest her of ownership during her lifetime. The words "badastur malik wa kabiz," which occur in both applications leave no doubt upon this point. Much stress is laid on behalf of the Plaintiffs on the expressions contained in the applications to the effect that *Gauhar Bibi* would not alienate the property without necessity, and it is contended that these words had the effect of making *Abdus Subhan* and *Abdul Rahman* owners of the estate subject only to the life-estate of *Gauhar Bibi*. And in arguing the case an attempt has been made to draw an analogy between the position of *Gauhar Bibi* after the compromise, and the estate possessed by a childless Hindu widow under the Hindu Law, in her husband's property. But the Hindu Law has so little in common with the principles of Mahomedan Law, that it can never be safe to draw generalised inferences on mere analogies. Moreover, in the present case, I am of opinion that no such analogy exists. It must be borne in mind that ever since the death of *Mouzzam Khan*, *Gauhar Bibi* distinctly asserted herself as the only lawful wife of the deceased, that throughout she denied the legitimacy of *Abdul Rahman* and *Abdus Subhan*, and in the suit in which the compromise was made her whole contention was that *Abdus Subhan* was not entitled to inherit from *Mouzzam Khan*. A careful consideration of the circumstances of the case and the terms of the compromise, as they are expressed in the original Hindustani, distinctly shews the exact nature of the transaction. *Gauhar Bibi*, whilst claiming to be the only lawful wife of *Mouzzam Khan*, and the only legal heir to his estate, was childless with no prospect of re-marriage. *Abdul Rahman* and *Abdus Subhan*, claiming to be the legitimate sons of her husband, were raising disputes in regard to the estate. So far as she was personally concerned, it did not matter much to her what became of the estate after her death. Judging by the native method of thought, under such circumstances it is easy to conceive that *Gauhar Bibi* would be anxious to put an end to the disputes by a compromise in the nature of a family arrangement which, whilst securing to her during her

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lifetime the complete ownership of the estate, would quiet the claimants by placing them in position of heirs apparent, or in other words by giving them the right to succeed to the estate upon her death. On the other hand it is natural to suppose that the two claimants, probably conscious of the weakness of their claims, were willing, in lieu of rendering obedience, to accept an arrangement which they expected would secure to them the entire estate after the death of the old lady. Beyond this *Gauhar Bibi* was not ready to give any further rights, nor would the two claimants insist upon more. *Gauhar Bibi's* application itself begins by saying that she had settled the dispute "*with a view of foresight;*" and the words of both applications shew that the so called restrictions upon her power of alienation were limited to such capricious transfers as might be made unnecessarily and with the special object of depriving them of their expected inheritance. This I look upon in the nature of a promise made probably in return for the obedience to *Gauhar Bibi,* which *Abdus Subhan* promised in his own application. But it is clear to me that her proprietary rights were not qualified in any such manner as to divest her wholly or partially of the incidents of ownership. The arrangement contained in the compromise would be called by the Mahomedan lawyers "a tauris" or "making some stranger an heir" and cannot be regarded as creating a present or vested interest. The words of the compromise do not bear any such construction as the Plaintiffs seek to put on them, and if they do create any interest such interest must be regarded as future and contingent upon the event of *Abdul Rahman* and *Abdus Subhan* surviving *Gauhar Bibi.* Under the Mahomedan Law a mere possibility, such as the expectant right of an heir apparent, is not regarded as a present or vested interest and cannot pass by succession, bequest, or transfer, so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan Law is uniform in its application to matters of succession, whether in virtue of bequest, inheritance or otherwise. The *jus representationis* known to other systems is totally foreign to the Mahomedan jurisprudence. The principle is too well known to require the citation of any authorities. And my finding on the seventh issue is that both *Abdul Rahman* and *Abdus Subhan,*

having died in the lifetime of *Gauhar Bibi*, they never acquired any vested rights in the estate, such as under the Mahomedan law could form the subject of inheritance."

The view of the Judicial Commissioner was as follows:—

"It appears to me that the effect of the compromise was to give *Gauhar Bibi* a life interest in the estate. The District Judge has held that under the Mahomedan law the expectant right of an heir apparent cannot pass by succession, but this is the case to a limited extent only. A son's son for instance cannot succeed, if there are sons alive, but, if there are no sons alive the son's son does succeed and the expectant right of the son has passed to the grandson. On the death of *Abdul Rahman* and *Abdus Subhan* their heirs took their place and had a right to the property on *Gauhar Bibi's* death. I cannot agree with the District Judge that on the death of *Abdul Rahman* and *Abdus Subhan* the family arrangement lapsed and *Gauhar Bibi* became sole owner.

"It has been urged that at any rate the arrangement cannot affect the *Partabgarh* property, for no copy of the compromise was ever filed in the *Partabgarh* Court. But the wording of the application shews that the parties meant the arrangement to cover the property in both districts, and the arrangement was acted up to, for the parties did not continue their litigation. I hold then that on the death of *Gauhar Bibi* the estate in both districts became the property of the heirs of *Abdul Rahman* and *Abdus Subhan*, that *Gauhar Bibi* had not the absolute right to alienate the estate, and that her gift to *Muradi Bibi* was invalid"

Woodroffe, and *Cowell*, for the Appellant, contended that the judgment of the District Judge was right, and that the suit should be dismissed. The petitions of compromise did not operate *inter vivos* so as to cut down *Gauhar Bibi's* rights in the property in suit to a life estate. They could not according to Mahomedan law operate to create or evidence any estate or interest of a present vested, reversionary or contingent nature in the property. It was not a transaction of gift, but of mutual compromise. Although a right of possession as distinct from bodily possession might therefore be stipulated for, yet Mahomedan law did not allow uncertainty as to the date of possession. Reference was made to Hedaya,

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vol. iii., bk. 26, c. 1; *Jeswunt Singjee Ubby Singjee* v. *Jet Singjee Ubby Singjee* (1); *Macn.*, Mahomedan Law, p. 124; *Ranee Khujooroonnissa* v. *Mussumat Roushun Tehan* (2); Hedaya, vol. ii., c. 5; *Baillie's* Sales, p. 208. The nature and effect of the compromise were as stated by the District Judge. The compromise so far as it was operative was contingent upon the survival of *Gauhar Bibi* by *Abdul Rahman* and *Abdus Subhan*, and did not, whether so contingent or not, enure to the benefit of their heirs on their death in her lifetime.

Cowie, Q C., and *C. W. Arathoon*, for the Respondents, contended that the true effect of the compromise was to admit the right of *Abdul Rahman* and *Abdus Subhan* to the property in suit, they conceding to *Gauhar Bibi*, who was then in possession, the right of enjoyment during her life. Before the confiscation *Gauhar Bibi* had no title. *Abdul* and *Abdus* were either furzidars for their father, and afterwards his heirs as regards the larger portion of the estate, or held adversely to their father. The first settlement no doubt after confiscation was made with *Gauhar Bibi*. But that settlement was not a talookdary settlement but only a zemindary one. *Gauhar Bibi* was not recorded a talookdar under Act I. of 1869, nor had any sannad been granted to her: See Act I. of 1869, sect. 8, and schedules i. and ii. The summary settlement did not confer or create any indefeasible right, but was expressly made subject to alteration at the regular settlement. The compromise therefore ought to be construed from the view that *Gauhar Bibi* had no antecedent title, but that the sons had a title derived from their father, who made over the ownership to them in his lifetime. Consequently the right construction is that *Gauhar Bibi* took a right to possession during her life, the absolute title remaining in the other parties to this compromise.

Woodroffe replied, denying that *Gauhar Bibi* had no antecedent title. The Government dealt with persons as talukdars before Act I. of 1869, and the evidence and admissions shewed that *Gauhar Bibi* had been so dealt with. *Gauhar Bibi* therefore came under the letter in schedule 1 of Act I. of 1869. Reference was

(1) 3 Moore's Ind. Ap. Ca. 245. (2) Law Rep. 3 Ind. Ap. 291.

made to *Nawab Malka Jahan Sahiba* v. *Deputy Commissioner of Lucknow* (1); *Prince Mirza Jehan Kudr Bahadoor* v. *Nawab Afsur Bahu Begum* (2). Reference was also made to *Zohorooddeen Sirdar* v. *Baharoollah Sircar* (3).

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The main question in this appeal arises upon the construction of an instrument of compromise, dated the 28th of April, 1866, consisting of two parts, one part being executed by one and the other by the other of the parties to the compromise. It was made in a suit instituted in the Court of the Extra Assistant Commissioner, Settlement Department, in the district of *Sultanpur*. In order to construe it, it is necessary to see what was the position of the parties when it was made. Between 1821 and 1825, one *Mouzzam Khan* acquired the ilaka *Audari*, consisting of seven villages, now in the *Rae Bareli*, but formerly in the *Sultanpur* district, and about the year 1849 he purchased, in the name of his sons *Abdul Rahman* and *Abdus Subhan*, the ilaka *Lewana*, consisting of eleven villages, in the district of *Partabgarh*. *Mouzzam Khan* died on the 22nd of January, 1850, leaving three widows, *Gauhar Bibi*, *Musammat Chameli*, and *Musammat Bakhtawar*, and two sons, *Abdul Rahman*, the son of *Chameli*, and *Abdus Subhan*, the son of *Bakhtawar*. It was admitted that *Gauhar Bibi* was his lawfully married wife, but it was contended on behalf of the Appellant that *Chameli* and *Bakhtawar* were never married to him, and that their sons were therefore illegitimate. *Musammat Bakhtawar* had also a daughter, *Musammat Nuran*, the Respondent, who it was contended was not *Mouzzam's* daughter, having been born only three months after her mother first entered his harem. In 1855 or 1856, before the annexation of *Oudh*, a settlement of the whole estate was made with *Gauhar Bibi*, and a kabuliat executed in her name, and from that time until her death she remained in possession of it. In April, 1858, shortly after Lord *Canning's* Proclamation of the 15th of March, 1858, by

(1) Law Rep. 6 Ind. Ap. 63. (2) Law Rep. 6 Ind. Ap. 76.
(3) Suth. W. R. (1864) 185.

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which all the estates in *Oudh* were confiscated to the Government, a summary settlement of the estate was made with her. No sannad was granted to her, and her name is not entered in the list of persons who were to be considered talookdars within the meaning of Act I. of 1869 (the *Oudh Estates Act*). On the 31st of January, 1866, *Abdus Subhan* brought a suit in the Court of the Extra Assistant Commissioner, Settlement Department, against *Gauhar Bibi*, to recover one half of the village of *Sarah Mahesa*, one of the villages in *Audari*. In the plaint the tenure is described as talookdari without a sanad, and *Gauhar Bibi* is named as talookdar. The ground of the claim is stated to be, that *Mouzzam Khan*, during his lifetime, caused the kabuliat of the village in suit, together with the entire talooka, to be executed in the name of the Plaintiff and *Abdul Rahman*, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263 F.; in the middle of 1263 F., when British rule was established, the entire talooka was settled with strangers for non-payment of the arrears of Government revenues; after 1266 F. (1859), on the re-occupation of the province, the settlement of the entire talooka was made with the Defendant in the absence of the Plaintiff.

The Plaintiff did not rely upon any title in the sons as heirs of their father. He relied upon the kabuliat, and the possession under it, as evidence that their father in his lifetime made them real owners of the estate, and that they were not furzidars. He would have had to prove this, there being, according to the law in *India*, no presumption in their favour from the fact of their being sons of *Mouzzam*. It does not appear in the record of the present suit what defence was made by *Gauhar Bibi*. Possibly no formal defence was made before the compromise was come to. Her case would be that in 1855 or 1856 a settlement of the estate was made with her and a kabuliat executed in her name, and she had ever since been in possession of it; and further, that in April, 1858, after the confiscation, the Government had made a summary settlement with her. The compromise was made by two petitions to the Settlement Court, one by *Abdus Subhan*, and the other by *Gauhar Bibi*. The former is in these words:—

"Whereas the Petitioner has instituted a suit in the Settlement

Court against his mother, *Musammat Gauhar Bibi*, for proprietary right in half of talooka *Sarai Mahesa*, in pergana *Rokha*, in the *Sultanpur* district. Now, an amicable settlement having been made between the Petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (mau mukir) commit to writing that (my) mother, Defendant, shall during her lifetime continue as heretofore (ba dastur) to hold possession of and be mistress of the talooka, and manage the estate through agents, but she shall not, without any special emergency, alienate any property so as to deprive me of my right, and that after her death I, the declarant (mau mukir), and my step-brother, *Abdul Rahman*, shall possess and enjoy each one half of the entire ilaka, situate in the districts of *Sultanpur* and *Partabgarh*, and that so long as the Defendant may be living I shall obey her."

The petition of *Gauhar Bibi* is similar to this, with the addition, after the names of *Abdul Rahman* and *Abdas Subhan*, of the words, "shall become successors to and proprietors of the said ilaka." Thereupon the Court, on the 28th of April, made an order dismissing the suit.

Abdus Subhan died on the 25th of February, 1868, and *Abdul Rahman* on 10th of March, 1874, leaving a daughter, *Muradi Bibi*. On the 30th of April, 1874, *Gauhar Bibi* executed a deed of gift in favour of *Muradi Bibi*, and on the 18th of October, 1875, *Gauhar Bibi* died, leaving *Muradi* in possession of the entire estate. There had been some litigation between *Mustafa Khan*, the nephew of *Mouzzam*, and *Gauhar Bibi*, but it is not necessary to notice those suits, nor a suit brought by him against *Muradi Bibi* after *Gauhar Bibi's* death.

The suit which is the subject of this appeal was brought on the 1st of November, 1880, by *Musammat Nuran Bibi*, *Sardar Prem Singh*, and *Mahomed Taha Khan*, the latter two being said to be purchasers from *Nuran Bibi* of a share of the estate, against *Abdul Wahid Khan*, the husband of *Muradi Bibi*, *Musammat Shaluka*, one of the two widows of *Abdul Rahman*, and other Defendants who were mortgagees of the estate. The claim was to recover possession of 8 annas 7 pie share of the estate by virtue of in-

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heritance from *Abdul Rahman* and *Abdus Subhan*, and the ground of it is stated to be that, by virtue of the transfer of the property effected by *Mouzzam Khan* in his lifetime, by causing a kabuliat to be executed, both the sons remained in proprietary possession of the estate down to 1262 F., and that under the deed of compromise, *Abdus Subhan's* right to one half of the estate and *Abdul Rahman's* to the other half having been admitted, it was settled that *Gauhar Bibi* should retain possession of the estate during her lifetime, without power of alienation, and that after her death both the sons would take the estate half and half. The Respondents, in the reasons in their case in this appeal, put the same construction upon the compromise, and in the argument their counsel contended that it was a recognition of right of inheritance in respect of what would have been the son's rights, supposing they had succeeded in the suit.

Their Lordships are of opinion that the compromise cannot be construed as admitting the right which was claimed by either of the parties. In *Abdus Subhan's* petition it is stated that *Gauhar Bibi* sued for proprietary right, and if she is to be considered as admitting the proprietary right which the sons sued for, they must be equally considered as admitting her proprietary right. These rights are inconsistent, and, as both could not have been admitted by the compromise, neither can be considered as having been. Further, *Gauhar Bibi* is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the talooka. During her life, the whole interest in the estate is to be in her. Then comes the question. What is the interest which is given by the compromise to the sons? To give the Plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognised by the Mahomedan law. The suit was tried in the first instance by the District Judge of *Rae Bareli*, a Mahomedan, who held that the interest, if any, created by the compromise must be regarded as future, and contingent upon the event of *Abdul Rahman* and *Abdus Subhan* surviving *Gauhar Bibi*. After giving his translations of the petitions, which substantially

agree with those which have been quoted from the record, he says,—

"From these words in the application it is clear, to my mind, that the parties to the compromise intended that *Gauhar Bibi* should continue to be the proprietress and possessor of the estate as before, and without any limitations or restrictions which would divest her of ownership during her lifetime. The words 'badastur malik wa kabiz,' which occur in both applications, leave no doubt upon this point."

Further on, he says,—

"But it is clear to me that her (*Gauhar Bibi*) proprietary rights were not qualified in any such manner as to divest her, wholly or partially, of the incidents of ownership. The arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris,' or 'making some stranger an heir,' and cannot be regarded as creating a present or vested interest. The words of the compromise do not bear any such construction as the Plaintiffs seek to put on them, and if they do create any interest, such interest must be regarded as future, and contingent upon the event of *Abdul Rahman* and *Abdus Subhan* surviving *Gauhar Bibi*. Under the Mahomedan law, a mere possibility, such as the expectant right of an heir apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest, or transfer so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan law is uniform in its application to matters of bequest, inheritance or otherwise."

There was an appeal from this decision to the Judicial Commissioner, who reversed it, holding that on the death of *Gauhar Bibi* the estate became the property of the heirs of *Abdul Rahman* and *Abdus Subhan*, that *Gauhar Bibi* had not the absolute right to alienate the estate, and that her gift to *Muradi Bibi* was invalid. He said it appeared to him that the effect of the compromise was to give *Gauhar Bibi* a life interest in the estate, and on the death of *Abdul Rahman* and *Abdus Subhan* their heirs took their place and had a right to their property on *Gauhar Bibi's* death. He

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seems to have thought that this was in accordance with the Mahomedan law, but it is not clear that he did so.

Their Lordships do not take this view of the compromise. In *Musammat Humeeda* v. *Musammat Budlun* (1), in which judgment was given by this Committee on the 26th March, 1872, the High Court of *Calcutta* had held that, by an arrangement between the Plaintiff, a Mahomedan widow, and her son, an estate was vested in the Plaintiff for life, and after her death was to devolve on her son by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the Plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in *Abdul Rahman* and *Abdus Subhan* which passed to their heirs on their death in the lifetime of *Gauhar Bibi*.

It is unnecessary to consider the other questions raised in this appeal, and their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and to order the appeal to him to be dismissed, with costs. And the Respondents will pay the costs of this appeal.

Solicitors for the Appellant: *Barrow & Rogers.*
Solicitor for the Respondents: *T. L. Wilson.*

(1) 17 Suth. W. R. 525.

SOOKHMOY CHUNDER DASS AND ANOTHER DEFENDANTS;

AND

SRIMATI MONOHURRI DASI . . . . PLAINTIFF.

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March 5, 6.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Will—Construction—Perpetuity.

Where it clearly appeared that a Hindu testator's intention was that his estate itself should not be disposed of, but to make a gift simply with reference to the enjoyment of the profits, the object being to create a perpetuity as regards the estate, and to limit for an indefinite period the enjoyment of the profits of it:—

Held, that by Hindu law the whole will was invalid.

APPEAL from a decree of the High Court (June 21, 1881), whereby a decree of the Subordinate Judge of *Dacca* (Sept. 24, 1878), was affirmed.

The suit was brought by the Respondent, as widow and heiress of her deceased husband, *Anund Hari Dass*, to recover the estate movable and immovable which her husband had inherited from his father, *Krishna Pershad*, the testator in the cause named, and which consisted, in the event of *Krishna Pershad's* intestacy, of a fourth share in the testator's estate.

The testator was thrice married. By his first wife he had no son. By his second wife he had one son, the first-named Appellant, *Sookhmoy Chunder Dass*. By his third and only surviving wife, *Srimati Pria Dasi*, he had three sons, born before his will, which was dated the 28th of April, 1853, named respectively *Hari Charan Das*, *Gour Hurri Dass*, and *Anund Hari Dass*; a fourth, born shortly after his death, who lived but a very short time, and died unnamed.

The testator died on the 12th Jeyt, 1260, B.S., the 24th of May, 1853, without having revoked his will; of which pars. 6 to 12 and par. 15 are as follows:

"Par. 6.—My estate shall remain intact, and from the profits

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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thereof there shall be performed the worship, the periodical festivals and ceremonies of my ancestral deities, idols and chakras according to my turn, as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zemindaris, talooks and other immovable properties, and my business of various descriptions, and the capital stock thereof, shall always remain intact as at present, and my heirs, sons, sons' sons, and great grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immovable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If any one succeeds in doing so, or will do so, it shall be disallowed by the authorities.

"Par. 7.—After my death, my eldest son, *Sriman Sookhmoy Chunder Dass*, shall, as provided by this will, act as kurta (manager) for the preservation and management of my entire estate, as shebait to the deities, idols and chakras in my turn; and shall, as kurta, manage and perform the affairs and duties as they are now performed by me from the profits of my estates, commercial transactions, mercantile and banking business, zemindaris and talooks, and the rents and profits of my houses; and as such karmadhyakha (manager of business) he shall prepare accounts as they are now prepared in my time, year after year, shall keep one set with himself, and shall make over another set to the mother and guardian of the minors. But he shall always be devoid of power to alienate my immovable properties which are now in existence, by sale, gift, or otherwise, or to misappropriate or waste the capital stock of my business. If he do so, such act shall be null and void, and the person who acts in contravention (of these provisions) shall be deprived of his right and interest (under this will).

"Par. 8.—Whichever of my sons shall, after my death, act as samarakshak (protector) and karmadhyakha (business manager) of the estate for the time being, according to the terms of this will, shall duly, and at the proper times, pay the government revenue from the profits of the landed properties belonging to the estate, and shall thus protect the estate. If any immovable property shall be lost through the negligence of the manager,

and otherwise than by divine visitation and circumstances over which there is no control, the liability to make good such loss shall rest with the manager. After discharging the public revenue, the collection charges, and the cost of repairs of the houses from the profits of the immovable properties and of the trading business, six-sixteenths (6 annas) of the entire surplus balance shall be applied year after year in part towards the performance of the worship and periodical festivals of my ancestral deities, idols, and chakras in the proper turn, and the residue thereof towards the maintenance of all the members of the family, and the performance of religious rites and ceremonies; and the remaining ten-sixteenths (10 annas) shall be carried to the credit of my estate. If disagreement and discord eventually take place between him (the said *Sookhmoy Chunder*) and the mother of the minors, and they want to live in separate mess, then the said ten-sixteenths (10 annas share) being regarded as a whole (or sixteen-sixteenths), my eldest son *Sriman Sookhmoy Chunder Dass*, in consideration of his having in my lifetime increased the wealth by his labour and exertions in managing the trading business, shall receive five-sixteenths of such whole or sixteen-sixteenths, *i.e.*, five-sixteenths of ten-sixteenths in the following case, that is to say, if a son is born to my last-married wife of her present conception; and the sons of my last-married wife shall receive the remaining eleven-sixteenths (or 11 annas) in equal shares. If the issue of the present conception of my last-married wife is not a male child, or if being a male child he dies unmarried, then my eldest son, *Sookhmoy Chunder Dass*, shall, for the reasons above-mentioned, receive five and a half sixteenths (or annas), and the other sons ten and a half sixteenths (or annas) in equal shares, and they in their respective rights shall be competent to enjoy and make gift of such profits.

"Par. 9.—As long as my last-married wife and the sons born of her womb, and my eldest son, the said *Sookhmoy Chunder Dass*, shall live in concord with one another, the expenses of the deb-sheba, &c., and of the maintenance and daily and periodical rites and ceremonies of all the members of the family shall be defrayed from the 6 annas share of the profits aforesaid. If, however, after all, they disagree and fall out with each other and separate in

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mess, then the sums of money that may fall to the respective shares of the different sons, under the terms of the will, shall be placed to their respective credits in the accounts of every year. Any of the sharers shall, upon attainment of majority, be competent to take and receive, upon his receipt, from the manager the money placed at his credit, whenever he may wish to do so. If the manager fraudulently refuses to pay the same, he and his right to receive the profits shall be liable to make good the sharer's claim with interest on the amount in deposit to his credit (such interest to run) from the date of demand, and the manager shall have no right of objection thereto.

"Par. 10.—The several objects, to which the 6 anna share has been appropriated, are likely to be effectuated in the same manner (as before) so long as concord and harmony exist. If, however, my last-married wife or her sons do not agree with *Sookhmoy Chunder Dass*, or his wife and son, and if there arise (in consequence) a necessity for separation, they shall be at liberty to separate, and, with the exception of the landed properties and capital stock of the trading business now belonging to my estate, and the articles used by the idols, to divide and take, to appropriate, and to convey by gift, sale or otherwise, the other moveable properties subject to the conditions, provisions and shares laid down in the 8th paragraph preceding for the division of the 10 anna share of the profits. Out of the 6 anna share set aside for the expenses of the deb-sheba, &c., my last-married wife shall, during the minority of her sons, receive from the manager Rs.12 per month for the maintenance of herself and the minors, and the balance shall remain in the hands of the manager, who shall meet from it the expenses of the yearly, periodical, and daily rites and ceremonies. Any one of my sons by my last-married wife who attains majority, shall, from the date of his so attaining majority, cease to receive for his maintenance his proportionate share of the said Rs.12, and shall be entitled to his proper share (under this will), and shall enjoy and appropriate the same, and the surplus balance of the said 6 anna share which remains after defraying the worship, the duties, and periodical and daily festivals and ceremonies, shall be received by my sons born of my two wives in equal shares, without any difference in their proportionate shares.

"Par. 11.—All my sons shall reside in and occupy my ancestral dwelling, and the dwelling-house and gardens constructed and laid out by myself. No one of them shall be competent to demolish the same, or alienate them by sale or gift. All my sons will be entitled to hold and enjoy the same in equal shares.

"Par. 12.—If any one of my heirs dies without male issue, his widow shall receive maintenance only, and his grandson by a daughter (if any) shall get nothing. The profits of his share shall be received in equal shares by the surviving sons. She shall remain in the family dwelling-house as long as she lives, and on her death the surviving sons shall receive the same in equal shares for their residence.

"Par. 15.—After the death of *Sriman Sookhmoy Chunder Dass* by the will of God, my eldest surviving heir for the time being shall discharge and perform all the duties aforesaid as protector and manager of the entire estate as kurta and shebait, according to the provisions of the 7th paragraph. And this direction shall hold good in respect of the sons, grandsons, and other heirs in succession."

The questions considered in the appeal were as to the construction and effect of the will, the Appellant having by his written statement submitted that the Respondent was precluded thereby from obtaining any relief in respect of her husband's patrimony.

Cowie, Q.C., and *Doyne*, for the Appellants, contended that the lower Courts were wrong in holding that *Krishna Pershad* had in law died intestate. They have laid hold of the expressions in the will as to future interests as leading to an entire intestacy. But the *Hindu Wills Act* has no provision against accumulations: differing in this respect from Act X. of 1865. It should have been held that the gift by the testator to his sons of the profits of his estate in the 6th paragraph of his will and elsewhere contained was a good and valid gift of the *corpus* of his estate, and was not invalidated by any of the subsequent provisions. It is equivalent to a gift for lives in being, or equivalent to a grant of the *corpus*. A devise of the profits is equivalent to a devise of the land: it is an unlimited devise. Reference was made to *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1); *Ashutosh*

(1) 8 Moore's Ind. Ap. Ca. 66.

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Dutt v. *Doorga Churn Chatterjee* (1). As to the 10 annas share there was no intention, according to the true construction of the will, of perpetual accumulation. The 8th paragraph provided that in case of separation between the testator's sons, they were to be entitled to take their profits in defined and separate shares. In any event the dispositions of the will were good for the lives of the sons. In that way there was not a complete intestacy, and the Plaintiff was excluded from any rights except those of maintenance. As regards the gift over after the expiration of the life interest: see *Soorjeemony Dossee* v. *Denobundhoo Mullick* (2); *The Tagore Case* (3). With regard to the 12th paragraph of the will, reference was made to *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar* (4). With regard to gifts to a class: see *Leake* v. *Robinson* (5); *Indian Property Act*, IV. of 1882; *Godolphin* v. *Duke of Marlborough* (6).

Leith, Q.C., and *Woodroffe*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought to recover a part of the estate of one *Krishna Pershad Dass*, who died on the 24th of May, 1853. Upon his death he left a third wife, the Defendant *Srimati Pria Dasi*, *Sookhmoy Chunder Dass*, his eldest son by a former wife the present Appellant, and three minor sons, *Hurry Churn*, *Gour Hurri*, and *Anund Hurri*. Another son was born shortly after his death, but as this son only lived for a few days it is not necessary to take any further notice of him. It is only material with regard to the shares into which the estate would be divided. *Anund Hurri*, one of the sons, married the present Plaintiff, and died in 1873 without leaving children, leaving the Plaintiff his heir-at-law. Thereupon the Plaintiff brought the suit, seeking to recover the share of the estate of *Krishna Pershad Dass*, her father-in-law, which she

(1) Law Rep. 6 Ind. Ap. 182.
(2) 6 Moore's Ind. Ap. Ca. 526; 9 Moore's Ind. Ap. Ca. 123.
(3) Law Rep. Ind. Ap. Supp. Vol. pp. 47, 69.
(4) Law Rep. 10 Ind. Ap. 51.
(5) 2 Mer. 363.
(6) 2 Ves. Sen. 61.

alleged had belonged to her husband, *Anund Hurri*. The question as to whether she is entitled to recover or not depends upon whether *Krishna Pershad Dass* left a valid will of his property. If he did, she would not be entitled to recover in the way she claimed. The property would be subject to the will, and she would take such rights, if any, as the will would give her.

The District Judge who tried the suit gave a decree in favour of the Plaintiff; that she was entitled to recover the share claimed, and that she was also entitled to the account which she asked for in her plaint. The High Court have confirmed that decree.

The first material paragraph in the will (taking the translation which was adopted by the High Court) is the sixth, in which the testator says:—"My estate shall remain intact, and from the profits thereof there shall be performed the worship, the periodical festivals and ceremonies, of my ancestral deities, idols and chakras according to my turn, as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zemindaris, talooks, and other immovable properties, and my business of various descriptions, and the capital stock thereof, shall always remain intact as at present, and my heirs, sons, sons' sons, and great grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immovable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If any one succeeds in doing so, or will do so, it shall be disallowed by the authorities."

The question is, What was the intention of the testator in this provision of his will? He says distinctly, "my estate shall remain intact," and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons, &c., "shall be entitled to enjoy the profits thereof." These words appear to their Lordships to indicate that he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons mentioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law. It is true, if the bequest had been of rents and profits, and it appeared

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that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will? and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.

When we come to the subsequent clauses, they further confirm this view of his intention. Having said that the profits are to be enjoyed, he, in the subsequent paragraphs, provides for what he considers and intends to be the mode of the enjoyment; and it is very material to notice that in the 8th paragraph he assigns a 6 annas portion for the family worship of the idols, and also for the maintenance of the family whilst they continue joint, leaving a 10 annas share which, as long as the family remained joint, would not be, as he supposed, expended at all. What he does with that is to provide that it shall simply accumulate. He does not dispose of it in any way, but as long as the family remains joint it accumulates; again confirming the view that his intention was that the estate itself should not be disposed of.

Then he goes on to provide for the way in which the profits shall be enjoyed in the event of disagreement among the members of the family and their separating; but the whole of these provisions appear to their Lordships to be consistent with and to support the view that the intention was that the estate itself should not be disposed of, and that there was no gift of the estate, but simply a gift with reference to the enjoyment of the profits.

The whole question really resolves itself into what was the intention of the testator to be gathered from the will. Their Lordships think that this was his intention, and that is the construction which must be put upon the will. This is the view which has been taken by both the lower Courts. The Subordinate Judge, a Hindu gentleman quite acquainted with the customs of Hindu families, considered that that was the intention, and that being contrary to Hindu law, the will was an invalid will, and

that the Plaintiff was entitled to recover the share of the property which would belong to her husband, supposing the property not to be disposed of by the will.

There remains another question, and that is with regard to the account which has been ordered. The Subordinate Judge says, in reference to the 16th issue, which was the issue raised as to the accounts:—"I have to observe that it is not denied that no portion of the profits of the estate which have accrued to the estate since the death of *Krishna Hurri*, and which have remained in the hands of the manager, the Defendant No. 1, was given to *Anund Hurri*, and that no account was ever rendered to him. Under such a circumstance I am clearly of opinion that the Plaintiff, as the heiress of her husband, is entitled to an adjustment of accounts of the profits and proceeds of the estate from the date of her father-in-law's death to that of her husband's death, and from the date of her husband's death to the date of the suit, and to the amount of money which will be found due to her share under this adjustment of accounts. The account shall be taken in the execution case."

This is the same account as was ordered to be taken in a similar case of *Soorjeemony Dossee* v. *Denobundhoo Mullick* (1). It is not intended that the different payments by the manager, or moneys taken out by the members of the family, should be inquired into, but it is to ascertain what portion of the savings of the family, or the accumulations which have been made, the Plaintiff would be entitled to. It has been suggested that there may be settled accounts, and that there ought to be some provision to prevent the opening of settled accounts. The Subordinate Judge says very distinctly that no accounts have been rendered to *Anund Hurri*, and in the face of such a finding as that their Lordships think it would not be proper to insert in the decree any such provision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, the Appellants paying the costs thereof.

Solicitor for the Appellants: *T. L. Wilson.*

Solicitors for the Respondent: *Watkins & Lattey.*

(1) 9 Moore's Ind. Ap. Ca. 123.

J. C.*
1885
March 11, 12.

RAI RAGUNATH BALI . . . . . PLAINTIFF;

AND

RAI MAHARAJ BALI . . . . . DEFENDANT.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Law of Limitation—Act XV. of 1877, *s.* 127, *Sched. II.—Exclusion from Joint Estate.*

Held, that the Plaintiff having been excluded to his knowledge from his share of alleged joint property for more than twelve years, his suit was barred by the *Limitation Act* of 1877, c. 127, Schedule II.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (April 25, 1882), affirming a decree of the District Judge of *Lucknow* (Aug. 18, 1881), and dismissing the Appellant's suit with costs.

The facts are stated in the judgment of their Lordships.

Mayne, for the Appellant, contended that the District Judge wrongly refused to receive certain evidence to the effect that the talookdar held in trust for the other members of the family. It was, however, sufficiently established by the evidence on the record. As regards the investments made before the summary settlement of 1858, or from proceeds other than the talook, the Appellant in any event is entitled to a share, the family being joint, and no partition having been alleged or proved. No facts were proved sufficient in law to make out a partition. Reference was made to *Oudh Land Revenue Act*, No. XVII. of 1876; *Rani Lekraj Kuar* v. *Mahpal Singh* (1); *Rewun Pershad* v. *Mussumat Radha Beeby* (2); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (3); *Chhabila Manchand* v. *Jadavbai* (4); *Kristnappa Chetty* v. *Ramasawmy Iyer* (5); *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (6). Up to 1858 all accumulations would be divisible,

* *Present:*—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 7 Ind. Ap. 63.
(2) 4 Moore's Ind. Ap. Ca. 168.
(3) 12 Moore's Ind. Ap. Ca. 540.
(4) 3 Bomb. H. C. (O. C. J.) 87.
(5) 8 Madras H. C. R. 25.
(6) 13 Moore's Ind. Ap. Ca. 542.

and the rule of impartibility does not extend to moveables left by the holder of the impartible zemindary: *Sri Rajah Rajeswara* v. *Sri Virapratapah Rudra* (1). If there be a nucleus of joint family property out of which the acquisition would have been made the law throws on the managing member the *onus* of shewing that the acquisition was separate: *Luximon Row Sadasew* v. *Mullar Row Bajee* (2); *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty* (3); *Prankristo Mojoomdar* v. *Sreemutty Bhageerutee Gooptia* (4); *Gobindchunder Mookerjee* v. *Doorgapershad Baboo* (5); *Védavalli* v. *Narayana* (6); *Dhurm Das Pandey Mussumat Shama Soondri Dibiah* (7); *Limitation Act*, 127 of Schedule II. of Act XV. of 1877; *Hari* v. *Maruti* (8); *Hansji Chhiba* v. *Valabh Chhiba* (9). In *Thakoor Hurdeo Buksh* v. *Thakoor Jowahir Singh* (10) joint property was confiscated, and afterwards regranted to a single member of the family, who was held to take as a separate acquisition. But he may nevertheless be or become a trustee for the joint members of the family.

Graham, Q.C., and *Branson*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case *Rai Raghu Nath Bali* sued *Rai Maharaj Bali* for the purpose of recovering the half of a talook in *Oudh*, together with other property which is specified in the plaint, of various descriptions, some real property, some personal property, and some "Muafi villages." The relationship of the parties is sufficiently stated in a short pedigree to be found at the beginning of the judgment of the Subordinate Judge. It appears that *Sital Parshad* had three sons, *Suraj Bali*, *Anand Bali*, and *Partab Bali*. *Anand Bali* died without issue. *Partab Bali* had two sons, *Sheoraj* and the Plaintiff, *Sheoraj* having died some years before the suit was instituted. The other son of *Sital*, *Suraj Bali*, had a son,

(1) 5 Madras H. C. R. 31.
(2) 2 Knapp, 60.
(3) Law Rep. 4 Ind. Ap. 109.
(4) 20 Suth. W. R. 158.
(5) 14 Beng. L. R. 337.
(6) Ind. L. R. 2 Mad. 19.
(7) 3 Moore's Ind. Ap. Ca. 229, 240.
(8) Ind. L. R. 6 Bomb. 741.
(9) Ind. L. R. 7 Bomb. 297, 299.
(10) Law Rep. 4 Ind. Ap. 178; 6 Ind. Ap. 161.

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Abhram Bali, who died in 1880, leaving the Defendant his heir and successor.

The talook in question is one which for a very considerable time has descended to the eldest son, who has taken the whole of it, and has given maintenance to other members of the family. In 1858 a summary settlement of this talook was made with *Abhram Bali*, the father of the Defendant, and in 1860 *Abhram* received a sanad in pursuance of that summary settlement, whereby the talook was granted to him and to his heirs on the principle of primogeniture, and his name was subsequently inserted in the first and second list of talookdars in the *Oudh Estates Act* of 1869. This being so, no question has been raised on the part of the Appellant as to the right to the talook, except on the suggestion of a trust—the proof of which has entirely failed.

The other descriptions of property remain to be dealt with. First, with respect to the Muafi villages, it appears that there was a grant of them to *Partab*, the father of the Plaintiff, and *Sheoraj*, his eldest brother, for their lives. Those lives having determined, the property reverted to the Government, and was granted to the Defendant. With respect to them, also, no question arises.

We have only, therefore, to deal with accumulations which have been made by the Plaintiff or his father, or his ancestors. With respect to them it is admitted that any savings made from the proceeds of the talook since the summary settlement of 1858 would belong to the Defendant. The question, therefore, is still further reduced to savings and investments which have been made at an earlier time, or from proceeds other than those of the talook. As to them the Plaintiff contends that the family being joint, he is entitled to his share. A very able and ingenious argument has been addressed to their Lordships on the part of Mr. *Mayne* for the purpose of shewing that the family was joint. The Subordinate Judge has found that they were not joint; but in the view which their Lordships take of the case it is not necessary to decide this question.

It has been further contended by Mr. *Mayne* that the burden is thrown upon the Defendant to prove that there were no savings or accumulations other than out of the proceeds of the talook, or before 1858. But it appears to their Lordships also unnecessary to determine this question. They observe, however, that this is

not the case of an ordinary undivided Hindu family, if it be assumed that the family was for some purposes undivided, and that the presumptions must here depend upon somewhat special circumstances.

Their Lordships are of opinion that there is a ground, and a very distinct one, upon which the cause must be decided. It has been distinctly found by the District Judge,—(and that finding has been adopted, though not in express terms, by the Judicial Commissioner of *Oudh*, who has affirmed the judgment, though without giving any lengthened reasons for his decision),—"With respect to all the rest of the property other than the Muafi villages, I am of opinion that it is not only not proved that Plaintiff's branch had joint possession, but that the exclusive possession by *Abhram Bali* and Defendant on their own behalf alone is established." If this finding is right, the *Limitation Act* of 1877, c. 127, sched. II., applies, the term of twelve years, according to that Act, running from the time when the exclusion of the Plaintiff was known to him It appears to their Lordships that this finding of the Judge is altogether supported by the evidence, and that the Plaintiff's exclusion must have been known to him at latest in 1858 or 1860. It has indeed been contended that there was some joint possession on behalf of the Plaintiff, on the grounds, 1st, that he lived in the family house, though not in the same apartments with his cousin; 2ndly, that he obtained an allowance of some Rs.90 either per mensem or per annum,—it does not clearly appear which. The first of these grounds does not appear to their Lordships to establish joint possession; the second goes some way to negative it.

The Plaintiff has been excluded from his share, if he had one, of the family property, for more than twelve years, and he must have known of this exclusion. If so, the *Statute of Limitations* has run against him.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed, and the Appellant must pay the costs.

Solicitors for the Appellant: *Young, Jackson. & Beard.*
Solicitors for the Respondent: *Watkins & Lattey.*

J. C.*
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Feb. 24, 25.

THE RAJAH OF PITTAPUR . . . . DEFENDANT;

AND

SRI RAJAH VENKATA MAHIPATI SURYA AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Act VIII. of 1859, *sect.* 7—*Separate Causes of Action.*

Sect. 7 of Act VIII. of 1859 does not say that every suit shall include every cause of action, but that it shall include the whole of the claim arising out of the cause of action.

Where therefore a plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession, and afterwards sued to recover from the same defendant moveable property in consequence of its wrongful detention:—

Held, that the causes of action were distinct, and that sect. 7 did not apply.

Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum* (1) followed.

APPEAL from a decree of the High Court (March 19, 1880) modifying a decree of the District Judge of *Godavari* (Feb. 26, 1876), having in the interval remanded certain issues for trial.

The questions in the suit were as to the Respondents' right to recover the whole of certain moneys and jewels which they claimed as belonging to their father *Kumara Venkata's* estate and their own; and further, to recover a half-share of other moneys, jewels, and effects which they claimed under the will of *Bhavayyama.*

As to the latter claim, it was contended that it was barred by Act VIII. of 1859, sect. 7, in respect that it was part of the same cause of action which had been sued upon in a suit entitled O. S. 12 of 1872.

The original Defendant and Appellant was *Vellanki Lakshmi*,

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 11 Moore's Ind. Ap. Ca. 553.

aunt to the Respondents. The Rajah of *Pittapur* was substituted on her death as devisee and successor named by her will.

O. S. 12 of 1872 arose in this way. The Defendant had applied to have the estate *Viravaram* registered in her name. The Respondents, having unsuccessfully resisted this registration, sued to obtain cancelment of the registry. They obtained a decree in their favour, which was affirmed by the High Court. Their title to the said estate, as well as to the half-share of the personalty now sued for, was under the will of *Bhavayyama.*

The District Judge thought that the claim in respect of the half share was part of the same cause of action as had formerly been sued upon.

The High Court held as follows:—

"Plaintiffs had for some time been in quiet possession of the mutta of *Viravaram* under the will, when a tortious act of the Defendant in respect of the mutta drove them to a suit to set aside the effect of that tortious act which operated as a constructive dispossession. No doubt, in consequence of the defence set up, it became necessary for Plaintiffs to give evidence of the will, the execution of which Defendant denied.

"But the right and its infraction—not the ground of origin of the right and its infraction—constitute the cause of action, the cause—not the cause of the cause. In Suit No. 12 of 1872, possession under the will and wrongful invasion of that possession—not the will itself and wrongful challenge of the validity of the will—constituted the cause of action.

"This view is supported by the opinions of the Judges of the High Court of Judicature in England in *Vaughan* v. *Weldon* (1), which followed the carefully considered decision in *Jackson* v. *Spittal* (2), in which, after consideration of all the previous authorities, it was held that the act on the part of the Defendant, which gives the Plaintiff his cause of complaint, is the cause of action within the meaning of the Common Law Procedure Acts. Several other cases were referred to by Mr. *Johnstone*, viz., *Mothoor Mohun Mundul* v. *Khemunkuree Dossee* (3), *Kooer Golab*

(1) Law Rep. 10 C. P. 47. (2) Law Rep. 5 C. P. 542.
(3) 5 Suth. W. R. 182, Civil Ruling.

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Sing v. *Rao Kurun Sing* (1), and *Narayan Babaji* v. *Pandurang Ramchandra* (2), which are all in accordance with this view.

"The cause of action in the former suit, therefore, was the wrongful registration of the mutta, and from the nature of the case, is obviously not the same as the cause of action in the present suit as to the share in the personal property of *Bhavayyama.*

Leith, Q.C., and *Doyne*, for the Appellant.

Mayne, and *Johnstone*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Upon the several questions of fact which were raised in this suit there are two concurrent findings. As to one portion of the claim there is the finding of the Court which tried the case in the first instance; and as to the other portion there is the finding of the Court which tried the case upon remand. The High Court concurred with those respective findings. It is contended, however, that the High Court threw the onus of proof upon the Defendant, whereas it ought not to have been so thrown. But the Court did not throw the onus upon the Defendant as a matter of law but merely in drawing their own conclusions from the evidence upon matters of fact.

Their Lordships see no reason to think that the High Court erred in point of law or in point of fact in arriving at conclusions similar to those which had been come to by the Courts below.

The only remaining question then is whether, by reason of the non-claim in respect of the personal property in 1872, when the action was brought in respect of the estate called *Viravaram*, the Plaintiffs were by sect 7, Act VIII. of 1859, precluded in 1875 from bringing this action in respect of the personal property.

Their Lordships are of opinion that the claim in respect of the

(1) 10 Beng. L. R. p. 1.
(2) 12 Bomb. H. C. 148; see also 14 Moore's Ind. Ap. Ca. 197; 3 Madras H. C. Rep. p. 384, at p. 414.

personalty was not a claim falling within sect. 7 of Act VIII. of 1859. That section does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action,"—meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the Defendants having improperly turned the Plaintiffs out of possession of *Viravaram*. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action.

The case which Mr. *Doyne* cited from the 11th *Moore's* Indian Appeals, p. 553, decides "That the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit." Their Lordships are of opinion that the claim in respect of the personalty was founded on a cause of action distinct from that which was the foundation of the former suit.

For the above reasons their Lordships are of opinion that the Plaintiff was not barred by sect. 7 from maintaining his present suit, and they will, therefore, humbly advise her Majesty to affirm the judgment of the High Court, and to dismiss this appeal. The appellant must pay the costs of this appeal.

Solicitors for the Appellant: *Cobbold & Woolley.*

Solicitors for the Respondents: *Burton, Yeates, Hart & Burton.*

J. C.* 1885 March 12, 13.

THE ZEMINDAR OF PALCONDAH . . PLAINTIFF;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Limitation—Act XV. of 1877, *sect.* 10.

Held, that Act XV. of 1877, sect. 10, does not apply to the Government in possession of an estate in their own right under a claim of forfeiture arising from the conviction of the last holder, and not as trustee for a specific purpose.

APPEAL from a decree of the High Court (March 31, 1882) in its original jurisdiction.

The suit was brought against the Secretary of State by the Appellant, who claimed possession of the zemindary of *Palcondah*, which had been confiscated by the *Madras* Government in 1835, and also for an account and repayment of the subsequently accruing revenues. The claim for possession of the zemindary was subsequently struck out, as it was beyond the local jurisdiction of the Court. The High Court held that the suit was barred by the *Statute of Limitations.*

Davey, Q.C., and *Branson*, for the Appellant.

Macnaghten, Q.C., and *Mayne*, for the Respondent, were not called upon.

Act XV. of 1877, sect. 10, and the *Tanjore* case (1), were cited.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

The present case, when understood, seems to be reduced to a very short point indeed. When the old zemindar, the father of

* *Present*:—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 7 Moore's Ind. Ap. Cas. 476.

the present Plaintiff, died, he left three infant sons and some infant daughters. There was a dispute as to which of those three infant sons, by different mothers, was the heir to the zemindary. It is not necessary for their Lordships to express any opinion as to which was the right heir. Upon the father's death the resident magistrate went hastily to the spot in order to preserve the peace. He immediately reported what was the state of things that he found there, and that is the report which we have just got. That was in October, 1828, and, at that time, nothing further was done than the magistrate going there to protect the peace and reporting. He afterwards went further than that. In May, having made inquiries and found that there were plausible grounds for claims on each side, and that the general feeling of the country was in favour of *Kurmarazu*, the eldest of these boys, who was not born in wedlock, but who had been adopted by the principal wife, and who there were plausible grounds for saying really was the heir (their Lordships say no more than that there were plausible grounds for so saying), he recommended that he should be recognised as the heir to the zemindary. The Court of Wards Regulation Act, Regulation V. of 1804, sect. 6, provides as follows:—"The proceedings of the Court of Wards shall, in the first instance, be founded on the reports of the Collectors respectively to the end that no delay may occur in providing for the due security and management of the property of persons incapacitated by minority, sex, or natural infirmity; but Collectors making such reports upon insufficient authority, whereby inheritors of property shall be deprived of the possession and management of the said property on their own behalf, shall be liable to prosecution." Before anything was done upon his report, he proceeded to appoint guardians of the persons of each of these infants, not merely of the persons of the plaintiff and other sons, but also of the persons of the female children of the deceased zemindar. These, however, were mere personal guardians, and, in appointing them, nothing was done touching this estate at all. On the 17th of July, 1829, the Secretary to the Government writes to the Board of Revenue acknowledging the reports. He says:—"2. Upon the understanding that *Kurmarazu*, the person recognised by the Collector as the heir and successor to the zemindary, is so acknowledged

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by all parties concerned in the succession, the Right Honourable the Governor in Council resolves to recognise him as zemindar of *Palcondah;* and as he is incapacitated by minority from administering his own affairs, authorizes you to take the estate under your charge as Court of Wards, and to exercise the powers conferred by Regulation V. of 1804." That is the first act of the Government upon the matter. What the Government has there done is this. They state that upon the reports of the Collector, they will recognise *Kurmarazu*, and they authorize the Collector to take the estate under his charge, under the Regulation. Upon that the Court of Wards, undoubtedly, would become guardians of *Kurmarazu*, and, as such guardians, no doubt they took possession of the estate. It appears from a document which is not printed, but which Mr. *Davey* read, that when *Kurmarazu* came of full age the property was given over to him, and he was proclaimed as zemindar. On the assumption, upon which it must not by any means be understood that their Lordships have formed an opinion, because they have not the materials, that *Kurmarazu* was a usurper and the Plaintiff was entitled, the Court of Wards seem to have acted *bonâ fide* and upon very sufficient grounds, and, at the most, if the individuals acting as the Court of Wards were guilty of misconduct, that would not in any way affect the Government. *Kurmarazu* was then put into possession. Their Lordships see nothing which would have prevented the Plaintiff, when he came of full age, bringing an action against *Kurmarazu*, saying, "I am the true heir, and you are the usurper," and trying to recover the estate. Their Lordships know nothing what case he could have made, but there is nothing that would have hindered his doing so at that time. Whilst *Kurmarazu* was thus in possession of the property—for it seems clear that he was so—he was tried for high treason and rebellion, and convicted and sentenced to death.

That brings us to the next consideration, which perhaps hardly arises. It is under Regulation VII. of 1808, sect. 3:—"It is hereby further declared that any person born or residing under the protection of the British Government within the territories aforesaid, and consequently owing allegiance to the said Government, who, in violation of the obligation of such allegiance, shall

be guilty of any of the crimes specified in the preceding section" —which includes treason—"and who shall be convicted thereof by the sentence of a court-martial during the establishment of martial law, shall be liable to immediate punishment of death, and shall suffer the same accordingly by being hanged by the neck until he is dead, All persons who shall in such cases be adjudged by a court-martial to be guilty of any of the crimes specified in this regulation shall also forfeit to the British Government all property and effects, real and personal, which they shall have possessed within its territories at the time when the crime of which they may be convicted shall have been committed." *Kurmarazu*, therefore, at that time, being so convicted under the court-martial, forfeited all the right which he had to the zemindary. If the Plaintiff had come forward at that time and said that he was the right heir, and that *Kurmarazu* was but a usurper, their Lordships do not see that the forfeiture of *Kurmarazu* would have affected the rights of the Plaintiff to recover that land. As to that their Lordships say nothing, except that probably it would not. But at that time the Government came into possession, claiming by way of forfeiture from *Kurmarazu*, who had certainly been in possession in the manner which has been described. From the time the Plaintiff came of full age, which is stated to have been in 1837, far more than the period mentioned in the *Statute of Limitations* has run. Now, the contention, and the only contention, is this:—The *Statute of Limitations*, Act XV. of 1877, sect. 10, the only section cited, says, "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." It is contended that, under the circumstances already stated, the Government coming into possession under a claim of forfeiture from *Kurmarazu*, who had been let into possession by the Court of Wards, (we will for the present purpose assume by mistake,) are a person in whom the property had become vested in trust for a specific purpose, and that this action is brought against such a person for the purpose of following, in his or their hands, such

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property. It does seem to their Lordships not possible to make it clearer that that section does not apply to this case than by simply stating what that section is and what the case is. That is the only point on which the appeal has been brought, and it is the only point which it is necessary to decide.

Their Lordships therefore have not the slightest hesitation in advising her Majesty that this appeal should be dismissed. The Appellant must pay the costs.

Solicitors for the Appellant: *Keen, Rogers, & Co.*
Solicitor for the Respondent: *H. Treasure.*

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Feb. 18, 19, 20; *March* 17.

PRINCE MIRZA JEHAN KADR BAHADOOR PLAINTIFF;

AND

NAWAB BADSHOO BAHOO SAHIBA . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE DISTRICT JUDGE OF LUCKNOW.

Oudh Confiscation—Annulment of Confiscation—Title.

Held, with regard to a property which had been confiscated by Lord *Canning* in 1858, the confiscation having been subsequently annulled without any intention on the part of the Government to make a grant in favour of any person, that it must be treated as if there had never been any confiscation at all. Consequently a title thereto accrued or possession thereof enjoyed prior to the confiscation could be used to defeat an adverse claim.

APPEAL from a decree of the District Judge (Feb. 18, 1880), dismissing an appeal from the Civil Judge of *Lucknow* (June 18, 1879), whereby the Appellant's suit to recover possession of certain immovable property with mesne profits was, upon the hearing of the same after remand under Her Majesty's Order in Council (December 30, 1878), dismissed with costs.

The judgment of their Lordships in the appeal on which the order of remand was made will be found in Law Rep. 6 Ind. Ap. p. 80, the issues remanded being on pp. 86, 87.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Graham, Q.C., and *Woodroffe*, for the Appellant.

Leith, Q.C., and *Doyne*, for the Respondent.

March 17. The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

This suit relates to certain lands in *Oudh* which formerly belonged to *Mulka Kishwar*, the mother of the King who was deposed in the year 1856. She died on the 12th of February, 1860, leaving three children—her eldest son the ex-King, the second son who was commonly called the General Sahib, and the Respondent who was the Defendant below. The General Sahib died on the 28th of February, 1858, leaving one son, the Appellant, who was the Plaintiff below, and one daughter. The Defendant has for many years been in possession of the lands in question.

The Plaintiff commenced this suit on the 11th of March, 1875, claiming four-fifteenths of the property, as being his share of the share which his father took as one of *Mulka Kishwar's* heirs. The Defendant alleged that she was rightfully in possession under a deed of gift or exchange executed in her favour by *Mulka Kishwar* some time in the year 1856.

At the first hearing of the suit the Court, without going into the merits, dismissed it on the ground that it was barred by lapse of time, and the same view was taken by the Court of Appeal. It was held that time began to run from the death of *Mulka Kishwar*. The Plaintiff then appealed to Her Majesty in Council, who remanded the suit to be tried on certain issues, seven in number. On this appeal a distinction was taken between one portion of the property which is situate in the city of *Lucknow*, and another portion known as the mouza *Sahrawan*, which is in the district of *Unao*. It will be convenient to deal first with the property in *Lucknow*.

As regards this property the Judicial Committee found that, though it was confiscated in 1858, the confiscation was annulled in July, 1863, without any intention on the part of the Government to make a grant in favour of any person, and therefore the case must be treated as if there had never been any confiscation

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at all. If then the Defendant could prove either the gift she alleged, or possession prior to the confiscation, the Plaintiff's claim would be defeated. But those questions had never been tried, and so issues were directed upon them.

The issue as to the gift was tried by Mr. *Lincoln*, the Civil Judge of *Lucknow*, who found that "the property was gifted to Defendant by *Mulka Kishwar*. A deed was executed and lost. That gift is proved, and is valid according to law." On appeal to the District Judge, Mr. *Harington*, he found thus: "Although no deed of gift was executed, the late *Mulka Kishwar* did in her lifetime make a verbal gift of the kind known in *India* as hiba biliwaz of all the property in trust in favour of the Defendant and this gift was valid in law." Those findings are impugned by the present appeal.

The first observation that occurs is that the Plaintiff seeks to overturn the concurrent judgments of two Courts on a question of fact. To meet this difficulty, it is urged that though the two Courts are agreed as to the gift, they are at variance on the vital question whether the gift was by deed or by word of mouth; that the evidence of a gift is so inseparably mixed up with the evidence of a deed, that to deny the deed is tantamount to denying the gift; that the principal witnesses were not examined in Court, and therefore the first Court had not that advantage over Courts of Appeal which makes them reluctant to disturb its findings; and that the issues are not so much upon primary facts as upon inferences from complex groups of facts.

There is so much force in these observations that their Lordships have thought it necessary to hear and consider every part of the case. But the Judges below know the language used by the parties, and they live in the locality, and understand better than their Lordships can what modes of action are probable or improbable for persons in the situation of *Mulka Kishwar* and her children. And with regard to the variance between the Courts, it is remarkable that Mr. *Harington*, while rejecting the story of the deed, should yet have felt himself constrained by the probabilities of the case and by the weight of some of the evidence to decide in favour of the gift.

It would require strong and clear proof of miscarriage to induce

this Committee to decide against two such findings; whereas the utmost their Lordships can say in favour of the appeal is that the case is attended with so much obscurity that, if it were untouched by previous decisions, they would have great difficulty in deciding it. On the whole, however, their judgment is in favour of the gift, and they are clear that, if the evidence proves a gift, it proves a gift by deed. They will indicate the main lines of reasoning which lead to their conclusion.

In the first place, the Defendant has been in open and undoubted possession ever since July, 1863. It appears that formal notice of release from confiscation was served on a person who describes himself as agent of the ex-King and for the property of the General Sahib. No claim has been made by the ex-King or by the Plaintiff's sister. The Plaintiff himself does not allege ignorance or any other disadvantage which might explain why he never preferred any claim till the filing of his plaint. He only says that he was a minor when his father died in February, 1858. He had certainly reached majority in 1865, perhaps earlier. In such a case every reasonable intendment must be made in favour of long possession, and of the conclusion that a claim so long delayed is not a just one.

From the month of February, 1859, up to July, 1863, the Defendant told a consistent story about the gift, and she tells the same again in this suit. It is true that in some petitions put in on her behalf prior to February, 1859, by an agent, her claim to *Mulka Kishwar's* property is rested on gift generally without mentioning a deed. This is one of the reasons why Mr. *Harington* found there was no deed. But there is no inconsistency between making a claim in respect of a gift, and afterwards, when inquiry is made, stating that the gift was by deed. Seeing that Mahomedan law does not require any deed, and the alleged deed was not forthcoming, it was not dishonest or discreditable, though it may have been unwise, to make the first claim on the more general ground. Their Lordships attribute little weight to this circumstance.

The occasion of the alleged gift was one which was very likely to lead to some re-arrangement of family property. The exact date is nowhere stated. But it appears to have been after the

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annexation, and very shortly before *Mulka Kishwar* departed for *London* to plead her son's cause. She was going on what to purda-nashin ladies, who had probably never been far beyond the precincts of the palace, must have seemed a terrible journey. The mother and son, who were going away, must have looked at the chance that their parting with the Defendant would be a final one, as it proved to be in fact. It does not indeed follow that because some dealing with the property was likely to take place, it should be the particular dealing alleged; and part of the story, viz., that the daughter's gift of jewels to her mother formed the consideration of the gift by the mother, seems very improbable. But there is no difficulty whatever in believing that the daughter contributed what moveables she could to put her mother in funds which she must have needed, or that the mother made over her immoveable property to the daughter, who alone of her children remained in *Oudh*.

The witnesses, who have all been orally examined and cross-examined, though not all in Court, have in essential matters told a consistent story. In some incidents they have contradicted one another, or themselves. They have not been drilled into uniformity of statement. But there is no substantial discrepancy with regard to the following allegations: that a few days before her departure *Mulka Kishwar* sealed a deed making over her immoveable property to the Defendant; that orders were given to send a copy of the deed to Colonel *Outram* the Resident; and that *Jowahir Ali*, the steward, received orders to obey the Defendant as he had been obeying *Mulka Kishwar* herself. It may be added that the Defendant, though of royal rank, was submitted to cross-examination by Mr. *Thomas* the Plaintiff's counsel, and was not shaken in the essentials of her deposition.

Moreover, their Lordships think that the evidence establishes a probability that the copy ordered for Colonel *Outram*, or some notice of the deed, was actually sent to him. The loss of the deed and of the copy are easily accounted for by the general plunder and wreck which took place when *Lucknow* was in the hands of the insurgents. It may well be supposed that such places as the palace and the office of the Chief Commissioner would be severely ransacked. Under such circumstances, and

after the lapse of twenty years, the Courts below were justified in taking what evidence they could find in the official reports of those who inquired into the case many years earlier.

It seems that towards the end of the year 1858, when the Defendant first applied to be restored to *Mulka Kishwar's* property, the matter was referred to Mr. *Bickers* one of the Treasury officers for inquiry. The date of his report is not given. Several witnesses appeared before him to prove the gift, which he calls a bequest. After mentioning this he says. "A regular deed (since lost) is alleged to have been executed, and the late Mir Munshi of the Chief Commissioner's office *Tufazul Hosain,* declares that he saw a copy of it in the office, and that *Nawab Afsar Bahu* was recognised as the proprietor of her mother's estate after her departure." He recommends relinquishment of the property in favour of the Defendant. This report was before Mr. *Lincoln* and was used by him as evidence in the Defendant's favour.

On the appeal Mr. *Harington* examined a number of official records not previously produced, and among them a report of Mr. *Capper,* the Deputy Commissioner of *Lucknow,* before whom the question had come. It is dated the 9th of February, 1863, and so far as appears it was founded on examination of papers, not on any further hearing of witnesses. He mentions that the claimants produce witnesses to the deed and to notice having been given to the Chief Commissioner. He then says that no official sanction was given to any acts of the ex-King or his relatives at annexation, and adds, "The evidence only amounts to this, that a letter was sent to Colonel *Outram,* and that without replying he ordered it to be dakhil duftured, and there can be no doubt that this was not an official registry of the transaction." Referring to Mr. *Bickers'* report as having been contained in Captain *Perkins'* docket of the 15th of June, 1862, he says it is opposed to his previous ones and is inaccurate. But he does not say in what points it is inaccurate, and in one respect he says it is valuable. As regards the property now in suit, he recommends that the confiscation should be withdrawn, and that claimants should be left to make good their claims. As to other property then claimed for the Defendant, he holds that *Mulka Kishwar* had no power to dispose of it. It does not appear to

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their Lordships that the inference to be drawn from the specific statement in Mr. *Bickers'* report is at all displaced by Mr. *Capper*. The latter officer, while stating that there was evidence of the deed and of notice to Colonel *Outram*, contents himself with replying that the Government never recognised it. And that appears to have been quite sufficient for the purpose in hand, because the Government had complete dominion over the property by virtue of the confiscation.

In fact the Government did not on this occasion come to any decision on the question of the deed. As to part of the property then claimed by the Defendant they decided that *Mulka Kishwar* had no transferable title, and that on her death it reverted to the State. As to other part, the property now in suit, they decided to abandon the confiscation. From the documents now in the record, it seems that the Government substantially followed Mr. *Capper's* recommendations, while declining to give any opinion as to the alleged deed of gift.

Mr. *Harington* founds his opinion against the deed on two grounds. First, the non-mention of it in the Defendant's applications prior to February, 1859, which has been before observed on. Secondly, that the Government officers had decided against its existence. It has just been shewn that as regards the *Lucknow* property there was no such decision. But the Defendant also claimed under the gift the sum of five lacs of Government paper belonging to her mother. The decision of the Government was against her. The claim seems to have been disposed of very quickly, certainly before Mr. *Bickers'* report was made. Nothing whatever appears as to the grounds of decision; but it may be noticed that though Mr. *Bickers* mentions the decision, he could not have considered that it governed the claim to the *Lucknow* property, because as to that property he thinks it open to him to advise, and does advise, a decision in favour of the Defendant. Nor do either Mr. *Capper* or the Government treat the decision upon the five lacs as applying to the *Lucknow* property. All that can certainly be said is that, if the Government decided upon any ground applicable to the present case, they must have decided not only against the deed, but against the gift, in which Mr. *Harington* differs from them.

The gift being established, the Defendant's possession is only material if possession was necessary to sustain such a gift as is here proved. On this it is sufficient to say that, if possession was necessary, both Judges have found the fact in favour of the Defendant, and there is no reason to question their decision.

As regards the *Sahrawan* property some different considerations arise. The view taken by this Committee in 1878 was that, as the effect of Lord *Canning's* proclamation was to put an end to all previous titles, the title of either party must depend on some subsequent grant or proceeding of the Government, which again must have been within twelve years of the suit. In the *Lucknow* case, where there was no settlement to be made, this Committee considered that the Government had withdrawn themselves without making any order in favour of any definite person, and therefore the former title, whatever it might be, was let in. In the *Sahrawan* case, where a settlement was necessary, they found an order of the Chief Commissioner in favour of "the heirs of *Mulka Kishwar*." That is the distinction taken between the two properties.

But the case had been imperfectly tried, and the materials for a complete judgment were wanting. The Committee had before them the extracts from the wajib-ul-arz which tended to shew that the settlement was actually made with the Defendant. But no kabulyat was forthcoming. Upon this they doubted whether the order of the Chief Commissioner was ever carried into effect. They desired to know whether there was any evidence that by the indefinite term "heirs of *Mulka Kishwar*" the Chief Commissioner intended to include the Plaintiff; and to know with whom the settlement was executed, and, if with the Defendant, whether she took it adversely to the other heirs or as a trustee. In effect the Committee decided that according to the evidence before them the root of the title was in the order of the 25th of October, 1863; that therefore no question of limitation could arise; and that the only question was whether the Plaintiff had been let in, or could come in, under the terms of that order. For the purpose of deciding that question, they directed issues calculated to elicit the whole of the facts.

On the second and third issues Mr. *Lincoln* finds that settle-

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ment was made with the Defendant solely and exclusively, and that no kabulyat was executed. Mr. *Harington* on the contrary finds that the settlement was made not with the Defendant but with the heirs of *Mulka Kishwar*, and that a kabulyat was executed in the Defendant's name as lumberdar. Such a flat contradiction on two simple matters of fact is somewhat startling, and has caused a good deal of perplexity. There are two documents in the record which were before Mr. *Lincoln*, and which, if they were the final documents, would warrant his finding as to the settlement.

One is in Record II., and is to the same effect as the extract from the wajit-ul-arz given in Record I.. It is taken from the settlement volume, and is called "Statement of Khawut of village *Sahrawan*." Under the head "Details of Shares of the Sharers," the Defendant is entered as having twenty biswas, or the entirety of the village.

The other document is a copy of a rubkar given in Record II., and was not in Record I. at all. It purports to be a "Proceeding of the Settlement Court, presided over by *Munshi Niamat Ali Khan*, Settlement Extra Assistant Commissioner, held on the 21st of July, 1865."

It runs thus:—

"In the matter of appointment of lumberdar of village *Sahrawan*, *Janki Parshad*, agent of *Nawab Afsar Bahu Begum*, lumberdar of *Sohrawan*, presented himself to-day, and a fard-ê-raz a mandi (record of assent) was drawn up. As *Nawab Afsar Bahu Begum*, lumberdar, is the sole proprietor of this village, and it is a zemindari village, and the Government revenue assessed thereon amounts to Rs.2,973, it is ordered that *Nawab Afsar Bahu Begum Sahiba*, the sole proprietor, be appointed lumberdar, and parwanah be issued for information of *Sadr Munserim* and tehsildar.

"A copy of this proceeding to be forwarded to the Deputy Commissioner for his information.

"Case to be consigned to records."

And it appears to have been put up with the Settlement Judicial Volume.

Mr. *Harington* does not take any notice of these documents, but only says that the volume of proceedings produced before Mr. *Lincoln* was the wrong volume, and of course did not contain the documents wanted. He called for the Final or Kishwar Volume, and treats the rubkar of the 20th of September, 1865, which is found there, as being the authentic and conclusive record. As regards the kabulyat it appears clear that none was found in the Judicial Settlement Volume, but that there was one duly entered in the final volume. As regards the khewat and the rubkar of the 21st of July, 1865, it is quite unexplained how such instruments have got into the Judicial Settlement Volume, and are unnoticed in the final volume.

Perhaps the difficulty which here seems great is not great to those who know the system of bookkeeping in the *Oudh* Settlement Office. However that may be, their Lordships think it right to act on the statement of Mr. *Harington*, which appears to be accepted as correct by the Judicial Commissioner, that the entry of the 20th of September, 1865, in the final volume represents the final settlement, and that, though the Defendant was to be lumberdar, it was made in favour of the heirs of *Mulka Kishwar* in the exact terms of Sir *C. Wingfield's* order of October, 1863.

It remains, then, to inquire who may claim under this order. On issue 4 the two Courts have again given contrary opinions. Mr. *Lincoln* holds that the Chief Commissioner meant the heirs of *Mulka Kishwar*, whoever they may have been, and that the order had no reference to the Plaintiff or any one else in particular. Mr. *Harington* holds that the Chief Commissioner intended to include the Plaintiff to his own portion of the share which his father would have been entitled to had he been then alive. But there is no further evidence of the intention, and the reasoning of both Courts proceeds on the order of October, 1863, and the antecedent circumstances. Both Courts find that the gift of 1858 excludes the Plaintiff.

The language of Sir *C. Wingfield* is that the decree shall run in the name of the heirs of *Mulka Kishwar*, and he adds that the Defendant and her other children can claim a share in the property. If these expressions are to be literally construed, it is

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clear that the Plaintiff can make no claim, for he is neither heir nor child of *Mulka Kishwar*. Their Lordships agree in the view that the instrument is not one which ought to be construed as if it were using exact terms of art. But if the strict meaning of the terms is departed from, the question arises whether the departure must not be carried to a greater length than is just sufficient to let in the claims of the Plaintiff. That question must be determined on a view of the circumstances under which Sir *C. Wingfield* made his order.

The course of decision in the Settlement Courts is recited in the rubkar of the 20th of September, and was as follows. Four parties claimed the settlement,—the old zemindars, *Kishen Sahai*, a person who had spent money on the village, the Defendant as representing *Mulka Kishwar*, and one *Fatima Khanum* representing *Agha Ahmed*. Both the latter claimed as mortgagees, and the question between them was whether the mortgage really belonged to *Agha Ahmed* or to *Mulka Kishwar*. On the 2nd of January, 1863, Mr. *Mackonochie* decided in favour of the old zemindars, dismissing the other claims. On appeal from this decision "the late Settlement Officer" (his name does not appear) made a decree, dated the 12th of March, 1863, in favour of *Fatima Khanum*. A second appeal was then carried to the Settlement Commissioner, Mr. *Currie*, who made his decree of the 3rd of August, 1863, in favour of the Defendant. A third appeal was carried to the Chief Commissioner, who made his decree of the 25th of October, 1863, which this Committee took as the root of title.

The first observation on these proceedings is that the Settlement Courts were clearly inquiring into the old titles as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. *Lincoln* suggests, whether in 1863 that effect was realized to the minds of the Government officers, as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk

of properties, they inquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three Lower Settlement Courts had been engaged with regard to *Sahrawan* when the case came before Sir *C. Wingfield* as the highest Court of Appeal.

The only issue then raised was between the representative of *Mulka Kishwar* on the one part, and persons claiming adversely to *Mulka Kishwar* on other parts. There was no contest between different persons claiming under *Mulka Kishwar*. The only representative of that lady was the Defendant, and it is somewhat significant that in the proceedings she is said to claim as heir, though it is clear that she was claiming under the gift. Mr. *Currie*, differing from the Courts below, had come to the conclusion that *Mulka Kishwar* was the true owner, and he incautiously worded his decree in favour of the only claimant under *Mulka Kishwar*. Sir *C. Wingfield* approved the substance of his decision, and, so far as regards all the parties before the Court, affirmed it, but, having regard to parties not before the Court, he modified its language so as to avoid prejudice to others who might claim to represent *Mulka Kishwar*.

It is true that the ground assigned for the modification is that in another case it had been shewn that there was no proof of the alleged gift to the Defendant. The other case is doubtless the *Lucknow* case, which was before Sir *C. Wingfield* in the previous July. His recollection of that case served his present purpose, that is, it warned him not to prejudice the pending question in favour of the Defendant, as Mr. *Currie's* decree would do; but he must have spoken from memory, and his memory was not quite accurate for all purposes. There was evidence of the gift, though whether it amounted to proof or not the Government never decided. They left that question to be decided at law.

Their Lordships think that the same course has been taken in the *Sahrawan* case. The intention of Sir *C. Wingfield* was simply to decide the case before him. On an inquiry into the old title he finds, as between *Mulka Kishwar* and the other parties, that she is entitled. But she is dead, and the decree cannot run in

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her name, so he uses a comprehensive expression, which is in common use, and which is used elsewhere in these very proceedings, to designate those who take a dead man's property. Their Lordships see no trace of any intention on his part to use exact terms of art, or to decide in favour of one person or another as between claimants under *Mulka Kishwar*, or to prejudice the litigation which he contemplated between such claimants, or to do anything but exclude those whose claims were wholly adverse to *Mulka Kishwar*. If he had been told a month afterwards that the deed of gift had been discovered, or that a court of law had (as has now happened) decided that the gift was established, he would probably not have found it necessary to rehear the case, or to do anything more than adjudicate between the claimants under *Mulka Kishwar*. It would have been just the same if a will of *Mulka Kishwar* had been produced, or if she had made a grant of the village to some entirely different person, or if some of the heirs themselves had made an alienation. Sir *C. Wingfield* could not possibly tell what interests might be set up when the "heirs of *Mulka Kishwar*" were the only parties in the field, and were called on to claim as against one another. He left all whom it concerned to fight that out. If we suppose him to have meant more than this, we should be attributing to him an intention to do the very thing he was correcting in his subordinate, viz., to decide in the dark, and to prejudice claims which had never been tried.

It has before been pointed out that the difference between the two properties in dispute consists in the circumstance that in the one case a settlement was to be made, and in the other none. It was quite necessary to have the additional materials now afforded as regards *Sahrawan*; but, having got them, their Lordships find that, so far as regards the form of orders made by the Government, little difference is left between this property and the other. In the *Lucknow* case the order of the 4th of July 1863, is: "The heirs of *Jania Ali* will be informed that they have no claim against Government, and should settle the dispute among themselves just as they like." And the parwana issued the same day directs the Darogah "to inform all the heirs to the Queen Dowager that the Government have reserved no claim

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whatever . . . and that they may mutually settle among themselves as they like." Yet in the *Lucknow* case the question of gift or no gift being decided in favour of the donee, the property falls to the donee.

The same result must follow in *Sahrawan*. The Plaintiff wholly fails, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitor for Respondent: *T. L. Wilson.*

BHUBANESWARI DEBI . . . . . PLAINTIFF;

AND

NILKOMUL LAHIRI . . . . . DEFENDANT.

J. C.*
1885
June 9.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Adoption—Adopted Son not Heir to collateral if adopted after his death.

According to Hindu law an adoption after the death of a collateral does not entitle an adopted son to come in as heir to the collateral.

An adoption having through the fraud of the Defendant been delayed till after the death of the collateral, the Defendant succeeded to the exclusion of the adopted son.

Held, that as the latter was unborn at the death of the collateral he had no remedy, since he could not under any circumstances have succeeded.

APPEAL from a decree of the High Court (March 25, 1881), setting aside a decree of the Subordinate Judge of *Rungpore* (April 30, 1879), and dismissing with costs the Appellant's suit.

The object of that suit was to recover from the Respondent one half of the estate which had belonged to *Rammohun Lahiri*, the Respondent's paternal uncle. The widow of *Rammohun*, named *Chandmoni*, had succeeded to his estate, and died in June, 1867. At her death his heirs were the sons (if any) of *Shibnath*, the husband of the Appellant, and the Respondent. *Shibnath* had left no son, but he had left a will empowering his widow to adopt.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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This will the Respondent fraudulently suppressed until after *Chandmoni* had died and *Rammohun's* estate had consequently vested in him (the Respondent) as sole heir. Afterwards the Appellant, *Shibnath's* widow, adopted the minor Plaintiff, *Jotindra Mohun Lahiri;* and sued, charging the fraud, and consequent delay in the adoption, and praying as above.

The Courts below concurred as to the fraud practised by the Defendant in the suppression of the will of *Shibnath Lahiri,* but they differed as to the resulting equity.

The first Court held that the Defendant fraudulently and in breach of the trust reposed in him suppressed the real will of *Shibnath Lahiri,* and put forward a forged will, without any power to adopt, and that he and his family priest dissuaded, during the lifetime of *Chandmoni,* various persons, who would have been otherwise willing, from giving their sons to *Bhubaneswari* to adopt, and so prevented her from obtaining a boy to adopt till after *Chandmoni's* death, and that therefore the Defendant, though he was by reason of his so preventing an adoption, the only reversionary heir of *Shibnath Lahiri* in existence at *Chandmoni's* death, should not be allowed by a Court of Equity to reap the benefit of his own fraud and deprive the subsequently adopted child of the moiety of the estate of *Rammohun Lahiri* which, if adopted before *Chandmoni's* death, he would have been entitled to.

And the Subordinate Judge accordingly gave the Plaintiff a decree for a moiety of the estate in suit, after excluding some parcels claimed, but which appeared not to be in the possession of the Defendant.

The High Court (*Morris* and *Tottenham,* J.J.) was of opinion that though the Defendant had committed the fraud with which he was charged and thereby "put obstacles in the way of *Bhubaneswari Debi* taking a son in adoption," yet, inasmuch as the minor Plaintiff, subsequently adopted, "was not even in existence when the fraud was committed by the Defendant," and inasmuch as *Bhubaneswari Debi,* notwithstanding the unwillingness of the persons she applied to to give her a boy to adopt, might "with some justice be said to have ample opportunity" of adopting before *Chandmoni's* death, "the fraud committed by the Defendant, so far as it affects the Plaintiff," was of too remote a character for that Court "as a Court of Equity to disturb the

estate, which naturally vested in the Defendant as sole heir of *Chandmoni* at the time of her death."

Rigby, Q.C., and *Doyne*, for the Appellant, contended that the Respondent should not be allowed to benefit by his fraud and forgery. There is no certainty that but for the Respondent's fraud some other boy, and not the Plaintiff, would have been adopted. The fact is that the Plaintiff has been adopted and has lost the estate in suit by the Respondent's fraud. He cannot set up that the fraud did not directly lead to that loss. [SIR BARNES PEACOCK:—If this woman had not been defrauded, this boy could not have succeeded. The succession opened at *Chandmoni's* death, when this boy was unborn, and could not have been adopted. SIR RICHARD COUCH:—He could not say that he would have been born in time. If his mother's marriage had been postponed owing to a fraudulent representation of the defendant, and he had in consequence been born too late to inherit a particular property, he could not have sued. LORD WATSON:—Besides, adoption is not a mere nomination of an heir. Bad as this case is, it is a mere fraud on the donor of the power.] The Respondent cannot take advantage of his concealment. The strength of the Appellant's case lies in estoppel. Fraud rendered it impossible that the adoption should take place at the right time; therefore the Respondent is estopped from saying that the adoption did not take place at the right time. *Omnia præsumuntur contra spoliatorem.* He was bound to produce the will. It became the duty of the Respondent to concur in the adoption, and as against him this particular adopted son has a claim. On proof of fraud, Courts of Equity will divest property already vested in favour of the rightful heir: *Luttrell* v. *Olmius* (1); *Middleton* v. *Middleton* (2); *Segrave* v. *Kirwan* (3); *Bulkley* v. *Wilford* (4). Besides, an adopted son takes from his adoptive father by inheritance, and his right relates back to his father's death: *Pudma Coomari Debi* v. *The Court of Wards* (5). His position is the same as that of a natural son, and he would take the property of collaterals: *Sumbhoochunder Chowdhry* v. *Naraini Dibeh* (6). When *Nilkomul* took upon

(1) 11 Ves. 638.
(2) 1 J. & W. 96.
(3) Beatt. 157.
(4) 2 Cl. & F. 102.
(5) Law Rep. 8 Ind. Ap. 246.
(6) 3 Knapp, 55.

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himself the office of manager of *Shibnath's* estate, he took upon himself the trusts of the will, and he was bound to see the adoption carried out.

Woodroffe, for the Respondent, was called upon in reference to the question of costs. He however cited *Kalidas Das* v. *Krishanchandra Das* (1).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Bhubaneswari Debi, as the mother and guardian of *Jotindra Mohun Lahiri*, sues to recover, on behalf of her son, half the estate of *Rammohun*. *Rammohun* died leaving two brothers and a widow, *Chandmoni*. He left no son, and consequently the widow succeeded and took the widow's estate, and until her death no one could be designated as his reversionary heir. She died on the 15th of June, 1867. *Shibnath*, one of the brothers of *Rammohun*, died on the 28th of May, 1861, in the lifetime of *Chandmoni*, having given power to his widow to adopt a son. He consequently did not succeed to any portion of the estate of his brother. *Kalimohun*, the other brother of *Rammohun* (we have not got the precise date of his death), died before *Chandmoni*, leaving a son, *Nilkomul*, who was the Defendant in the suit. If the widow of *Shibnath* had adopted a son during the liftime of *Chandmoni*, that son would have been entitled to a half share of the estate of *Rammohun* as one of the reversionary heirs of equal degree with *Nilkomul*, who was also a nephew. But the allegation is, that in consequence of *Nilkomul's* fraud in setting up a forged will, the widow of *Shibnath* was unable to get anyone to give her a son in adoption, and could not adopt until after the death of *Chandmoni*. In consequence of her not having adopted a son in the lifetime of *Chandmoni*, *Nilkomul* the Defendant became entitled to the whole of the property of his uncle unless his fraud entitles the boy who was subsequently adopted by the widow of *Shibnath*, to come in as the heir of one moiety of the estate.

It appears that the widow from time to time tried to get different persons to give her a son in adoption, and that they refused upon the ground of the forged will which had been set

(1) 2 Beng. L. R. F. B. 103.

up by the Defendant; and that consequently she could not get anyone to give her a son in adoption.

After the death of *Chandmoni* she did adopt the present Plaintiff; but it appears clearly upon the evidence in the record that the Plaintiff was not in existence at the time of the death of *Chandmoni*.

The widow never could, by adoption, if there had been no fraud, have made the present Plaintiff a reversionary heir of half the estate of *Rammohun*, because he was not in existence at the time of *Chandmoni's* death. According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral. It appears from the evidence of the natural father of the present Plaintiff that the widow applied to him in 1277—that is in the year 1870—to give her his son in adoption, and that at that time he gave to her in adoption his second son.

That was about four years after the death of *Chandmoni*, and then the father says in his cross-examination:—"When in 1277 she made her first attempt, the age of my second son"—that is the present Plaintiff—"was about two months." He was consequently only about two months old in 1870 or 1871, the widow having died in June, 1867. The boy never could, in the course of nature, have become the heir of *Rammohun's* estate. Under these circumstances the High Court came to a right conclusion in dismissing the Plaintiff's suit.

A question then arises whether, under the circumstances which have been detailed in the evidence, the fraud which has been brought home to the Defendant, and the forgery to which the High Court alluded, this is a case in which in their discretion their Lordships ought to give the Respondent the costs of the appeal.

Their Lordships are of opinion that the Respondent ought not to have those costs.

They will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and they make no order as to the costs of this appeal.

Solicitors for Appellant: *Wrentmore & Swinhoe.*
Solicitor for Respondent: *T. L. Wilson.*

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June 16, 17, 18.

SRI KISHEN AND OTHERS . . . . . DEFENDANTS;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . PLAINTIFF.

AND CROSS APPEAL.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Principal and Agent—Construction of Agreement—Forgery—Losses attributable to Agent's Misconduct.

The Defendant, as Sudder treasurer, gave to the Government the following engagement in respect of its darogah of stamps appointed as his agent: "Should any loss or deficiency arise from the non-production of accounts, or by misconduct or negligence, ... I hold myself responsible to make good such loss."

It appeared that the darogah, in collusion with the licensed vendors of stamps, forged stamps and accounted for their proceeds to the Government, while he misappropriated the proceeds of an equivalent amount of genuine stamps entrusted to him by the Treasury:—

Held, that, although the Defendant was not responsible in respect of the forgery committed, yet he was so for the misappropriation and false accounts of his agent; and that the losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by reason of the misappropriation and the false accounts.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (May 2, 1883), modifying in favour of the Respondent a decree of the District Judge of *Lucknow* (May 29, 1882), and allowing the Respondent's entire claim with full costs in the lower Court only.

On the 20th of May, 1881, the Plaintiff sued *Mohan Lal*, the father of the Appellants, as principal, and *Thakur Balder Buksh*, as his surety, for rendition by *Mohan Lal* of various accounts relating to certain stamps under the circumstances detailed in the judgment of their Lordships: or in the event of *Mohan Lal* being unable to render such accounts or any part thereof, then the Plaintiff claimed Rs.18,100 upon an agreement and security bond, respectively dated June 11, 1869.

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The agreement was in the following terms:—

"Whereas I, *Mohan Lall*, have been appointed Sudder treasurer in the district of *Lucknow*, I hereby acknowledge my responsibility for all public moneys, notes, deposits, stamp-paper, postage labels, and other property of Government, committed to my charge, or to that of agents appointed by me, or on my nomination, whether at the Sudder or Mofussil offices of the district, and I hereby engage to keep safely, and to render true account of the same, in conformity to official rules.

"II. I further engage to be responsible for my substitute, appointed with my consent, during my temporary absence at any time. Should any loss or deficiency arise from non-production of accounts, or by misconduct or negligence of myself, of my temporary substitute, or of agents appointed by me, or on my nomination, as above-mentioned, and whether such loss or deficiency relate to the public moneys, notes, deposits, stamp-paper, postage labels, or other property of Government committed to the charge of myself, my substitute, or agents, as aforesaid, I hold myself responsible to make good such loss or deficiency myself, or through my sureties, without delay or any pretext whatever."

The security bond was for the due performance of the agreement.

The circumstances out of which the suit arose appear in the judgment of their Lordships.

On the 7th of January, 1882, *Mohan Lal* pleaded that *Hinga Lal* was not his agent, that (even if he were) *Mohan Lal* was only bound to see that the value of all Court fee labels and stamps committed to his care was paid to the Government; that this had been done; that the property in the moneys paid for counterfeit stamps for the time being vested in the vendors; and that the Government was not entitled to the specific moneys, or to the proceeds of such sales, inasmuch as *Mohan Lal* was not liable for the tortious acts of *Hinga Lal*, that all moneys paid into the Treasury in respect of the sale of stamps and Court fee labels, having purported to be paid in respect of the sale of genuine stamps and Court fee labels, and having been received as such by the Government, and appropriated to the account of the genuine stamps

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abstracted by *Hinga Lal*, the Government was estopped from saying that it had not received the proceeds of such genuine stamps; and that as the Treasury officer and Deputy Commissioner had certified the accounts to be correct, and induced *Mohan Lal* to believe in their accuracy, Government was estopped from impeaching the accounts.

Both Courts decreed against both the Defendants, the decree under appeal being for the full amount claimed.

Mohan Lal appealed.

Sykes, for the Appellants, his heirs, contended that the agreement did not render *Mohan Lal* liable to protect the Treasury from loss, but to answer for Government property actually committed to his charge or that of any agent appointed with his consent. No loss had occurred of any such property. The parties to the forgeries were not his agents; and he was not liable for their forgery. At all events, on the evidence, the decree ought not to have been for a higher amount than that awarded by the lower Court.

Mayne, and *Macrae*, were called upon in reference to the question whether the loss complained of was attributable to the misappropriation of the stamps. They contended that no true accounts of the misappropriated stamps and Court fee labels had ever been rendered, and that if those true accounts had been rendered the circumstances would have been discovered. False accounts were rendered from which it was made to appear that genuine stamps had been sold. The Appellants are not entitled to credit against the value of genuine stamps misappropriated the sums received by the sale of counterfeit and altered stamps, &c., paid into the Treasury: *Story* on Agency, §§ 231-234; *The Guardians of Mansfield Union* v. *Wright* (1).

Sykes, replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

The basis of this suit is an agreement which was entered into on the 11th June, 1869, between *Mohan Lal* and the Government

(1) 9 Q. B. D. 683.

of *India*—the Secretary of State in Council represents the Government—on the occasion of *Mohan Lal* being appointed Sudder Treasurer in the district of *Lucknow*. The material words on which the claim is founded are these:—"Should any loss or deficiency arise from non-production of accounts, or by misconduct, or negligence of myself, of my temporary substitute, or of agents appointed by me, or on my nomination." Then:—"I hold myself responsible to make good such loss." What has happened is this. There have been extensive forgeries of stamps by subordinate officers of the Treasury of *Lucknow*. Against *Mohan Lal* himself there is no charge; he is perfectly innocent. But it is sought to make him liable by reason of the misconduct of his subordinates, and particularly of *Hinga Lal*, who was first the accountant, and then the darogah of stamps in the Treasury of *Lucknow*. The course of proceeding by those who committed the forgeries seems to have been as follows: *Hinga Lal* received out of the Treasury stamps for sale, according as he indented upon the Treasury for them. He did not sell them himself, or ought not to have sold them himself, direct to the purchasers, but distributed them to certain persons who were licensed vendors of stamps, who dealt directly with the public, received the money from the public, and whose duty it was to pay that money over to the Treasury. In some cases it appears that the purchasers paid direct to the Treasury, but either from the purchasers or from the vendors the Treasury ought to get the whole value of the stamps issued by it to *Hinga Lal*. It seems that there were daily accounts stated between the Treasury and the vendors, but between the Treasury and *Hingal Lal* the accounts were stated monthly, and, of course, at the end of every month it was necessary to shew that the money received by the Treasury was the exact value of the stamps which had been issued, excepting such as were not then sold and were accounted for as not sold. *Hinga Lal* colluded with the licensed vendors. They caused stamps to be forged either by making entirely new ones, or by altering some genuine stamps to larger amounts. The vendors sold those forged stamps, and they paid the whole of the proceeds into the Treasury. Then *Hinga Lal*, having got real stamps from the Treasury, took for himself and his accomplices so many as were

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exactly equivalent to the payments made into the Treasury. He accounted every month, so adjusting his accounts as to make the proceeds paid into the Treasury for the forged stamps by the licensed vendors exactly square with the value of the stamps issued by the Treasury to him, excepting so far as the same remained unsold. This seems a very curious and circuitous method of committing a crime, and it is not clear to their Lordships why it was followed—probably because they are not familiar with the working of the Treasury; but the Courts below, who are familiar with these local matters, are of opinion that, without that circuitous process, it was impossible that the fraud could have remained for any length of time undetected. In point of fact it went on for several years, certainly for five years, but the exact period of time is not material. Then it was discovered, and the forgers were convicted and punished.

Now a claim is brought against *Mohan Lal* which is stated in the sixth paragraph of the plaint, on the two grounds of the misappropriation of the stamps by *Hinga Lal*, and of the misconduct of *Hinga Lal* by falsifying his accounts and so causing loss to the Government. The plaint states that the stamps misappropriated by *Hinga Lal* amounted in value to Rs.18000, or more.

In order to recover upon that agreement the Plaintiff must shew that there is a loss or deficiency arising by the misconduct of an agent appointed by *Mohan Lal*, or on his nomination.

Upon that issue several defences are offered. First it is said that *Hinga Lal* was not the agent of *Mohan Lal*. *Hinga Lal* was employed in the Treasury from the year 1859 onwards, and it is admitted on the part of the Appellant that up to the year 1873 *Hinga Lal* was the agent of *Mohan Lal*: he was appointed by him, was paid by him, and, it may be assumed, was dismissible by him. But in the year 1873 the Government appointed *Hinga Lal* to a definite office, that of accountant in the Treasury, and instead of *Mohan Lal* paying him, thenceforward the Government paid him. It is contended that the change so altered *Hinga Lal's* position, that it made him the agent of the Government instead of the agent of *Mohan Lal*. The question is not of agency generally, but whether *Hinga Lal* was an agent within the purview of this agreement?

Both Courts below have found that he was, and as far as regards the issue whether *Mohan Lal* nominated *Hinga Lal*, their finding ought to be taken as conclusive under the usual rule, that being a pure matter of fact. Whether *Hinga Lal* was agent within the purview of this agreement is a matter of law. Their Lordships are of opinion that the Courts below have come to a right conclusion upon the evidence, and that, although it is not proved beyond possibility of doubt, it is sufficiently proved, in the first place, that *Mohan Lal* nominated him, and, in the second place, that the change which took place was not such as practically to alter the relations between *Mohan Lal* and *Hinga Lal*, considering them as principal and subordinate. In point of fact there is reason to believe from *Mohan Lal's* own letter which he wrote on the occasion, that no such alteration could have been in his contemplation. It was he who applied for the change, and he applied for it on the ground that his work had increased, and his security was onerous to him, and he begged that he might be relieved from the payment of the staff, including *Hinga Lal*, and also that his salary might be increased so as, he says, to be up to the standard of the security filed by him. The salary was increased, and, as he made no further application, we may fairly assume that he considered it adequate to the security that he gave.

Taking *Hinga Lal* to be the agent of *Mohan Lal* within this agreement, has there been misconduct on his part within the agreement? Of course there has been the very grossest and most glaring misconduct, because he has committed forgery, but the suit is not founded on the forgery, and probably no suit could be founded on the forgery, because the misconduct contemplated by this agreement must be some misconduct connected with the business of the agency, and forgery is in no way connected with the business of the agency. For instance, if *Hinga Lal*, after receiving the stamps issued out of the Treasury to him, had absconded with them that afternoon, that would have been misconduct chiefly connected with his business as agent of *Mohan Lal*, and such a case would have fallen within the agreement.

There is no doubt that on this part of the case a good deal of difficulty has been introduced from the circumstance that what

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may be called the root of the misconduct was the forgery, which would not directly afford ground for suit. But in two respects there is misconduct which is directly connected with the agency of *Hinga Lal*, that is to say, the misappropriation of the stamps which he represented to have been sold, and the false accounts which he rendered month by month, and in which he represented those stamps to have been sold by the vendors.

Then comes the question whether, there being misconduct within the meaning of the agreement, the loss or deficiency has arisen in consequence of that misconduct? As respects the misappropriation there is, no doubt, the difficulty that has just been mentioned of the forgery being calculated to cause loss in the first instance, and of its being necessary to disentangle the two things. It seems to have been very much argued in the Court below, and the point has been mooted here, not by the Appellant's counsel, but by this Board, and very carefully and ably argued at the bar by the Respondent's counsel, whether it was possible to attribute the loss to misappropriation of the stamps, and after much doubt their Lordships are of opinion that the Court below have rightly connected the loss with the misappropriation; that, supposing the accounts to be now taken between the Government on the one side, and the Treasurer of *Lucknow* on the other side, the Treasurer cannot claim to be allowed in account those moneys which were produced by the forged stamps, and which were used by *Hinga Lal* to cover his conversion to his own use of the genuine stamps that were issued to him.

The case on that point is strengthened very much by the false accounts. *Hinga Lal* represented in his monthly accounts that the whole of the genuine stamps which he represented as sold had been sold by the licensed vendors. In point of fact either they never were sold by the licensed vendors, or they had not at that time been sold, and, if his accounts had told the truth upon those points, then the forgery must have been discovered at once, and it is impossible that during a series of years the Government could have lost the money that it did lose by the forgeries.

That being so, the only other question is as to the amount to be recovered, and on that point there is a difference between the two Courts. With respect to the sum of Rs.11,700 the two Courts

agree. But there is a further sum, making in the whole Rs.18,100, the amount claimed, which the Judicial Commissioner has allowed, so far varying the decree of the Court below.

It is not necessary now to go into the evidence upon that point, because it is clearly shewn in the judgment of the Judicial Commissioner that the reason for the District Judge giving judgment only for the lesser amount was that he made a slip in construing the evidence. He had thought that there was a contradiction in the evidence, because one passage of it shews the larger amount of stamps allowed by the Judicial Commissioner to have been sold, while in another a lesser amount is stated. There is, however, no contradiction, because the two statements refer to two different periods of time, and the claim made in this suit embraces the longer period. Therefore the Judicial Commissioner was perfectly right in allowing the larger amount.

That being so, their Lordships are of opinion that the appeal of *Mohan Lal* should be dismissed with costs.

With respect to the cross appeal their Lordships think that the decree ought not to be varied in respect of the costs before the Judicial Commissioner, and that the cross appeal should be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.

Solicitor for the Appellants: *W. Buttle.*

Solicitor for the Secretary of State: *H. Treasure.*

J. C.*
1885
June 19.

MITCHELL . . . . . DEFENDANT.

AND

MATHURA DASS AND ANOTHER . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Law of Registration—Act III. of 1877, *s.* 49—*Confirmation of an unregistered Deed.*

Where a deed of conveyance, executed in 1873, but unregistered, was inadmissible in evidence under sect. 49 of Act III. of 1877, *held*, that a registered deed of conveyance, executed in 1878, and confirming the unregistered deed of 1873, operated to pass the property.

The grantee under that deed having paid the consideration money, and being shewn to be the true owner, the High Court was wrong in holding that his son, having been allowed to be in possession, with or without payment of rent, must be treated as owner, or that otherwise the provisions of the Registration Act would be defeated.

APPEAL from a decree of the High Court (Jan. 16, 1882) reversing a decree of the District Judge of *Cawnpore* (Sept. 9, 1880).

The decree appealed from declared that the property in suit, situate in *Cawnpore*, was the property of *William Mitchell*, and liable to be sold in execution of a decree obtained by the Respondents against him.

The facts are stated in the judgment of their Lordships.

The judgment of the High Court (*Straight* and *Tyrrell*, JJ.) was as follows:—

"The question for us to determine is whether the screw-house in suit was or was not the property of *William Mitchell* at the time of its attachment by the Plaintiffs, and in considering this point it will of course become necessary to decide upon the legitimacy or otherwise of the claim set up by *Alexander Mitchell*. We start with this fact, at least certain, that from the end of 1873, or the beginning of 1874, down to the time of the Plaintiff's attachment,

* *Present;*—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

William Mitchell was in occupation of and carrying on his business at the premises in question, to all external appearances as their proprietor and owner. Having established this lengthened possession on the part of their judgment debtor, the Plaintiffs reasonably enough contend that they have made out a *primâ facie* case, which it lies upon the Defendants to rebut. We think that this is the correct view of the position, and that it rests with *Alexander Mitchell* to prove his title. This he seeks to do in a fashion which is, to say the least of it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th of September, 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st of December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March, 1879, it was presented to the Collector for registration. Now even supposing registration had been formally and properly completed, we should have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed. But as a matter of fact the confirming bond of the 31st of December, 1878, never has been registered, whereas that of the 25th of September, 1873, contains the Registrar's certificate. It is said on the part of the Defendants that this is a mistake, and that the certificate in reality applies to the document of December, 1878.

"All we can say to this is, that the provisions of sects. 58, 59, and 60 of Act III. of 1877 have not been complied with, and that the instrument remains to all intents and purposes unregistered. We cannot regard this as such 'a defect in procedure' as is contemplated by sect. 87, and one which we can pass over. We, therefore, think that neither of the documents mentioned was admissible in evidence, and that in admitting that of December, 1878, in proof, the Judge decided erroneously. Then the question arises whether, failing the written evidence of his title,

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Alexander Mitchell can be permitted to prove it *aliunde.* If we were rigidly to apply the strict rules of law we should say no, but, in order effectually and conclusively to dispose of the suit, we think it best to consider such facts as there are in evidence, and to pass a decision upon them. We find it impossible not to regard the story now told by the Defendants with great suspicion. Even admitting that the consideration money for the screw-house was originally paid by *Alexander Mitchell,* the circumstances all point to his having done so in order to give his son, *William,* a start in business. He himself was never in *India,* and could have little or no knowledge of the value of the premises, while the suggestion that he fixed the amount of rent to be paid for them is absurd. The excuse that is put forward for the non-registration of the conveyance of 1873, namely, that it was through an oversight, does not commend itself to our minds, and it is remarkable that *William Mitchell* only awoke to the omission that had been made at the end of 1878, when he was on the verge of insolvency, and had become hopelessly involved. We cannot help feeling that there is much force in the suggestion of the counsel for the Plaintiff, that registration of the conveyance of 1873 was advisedly and intentionally not made in order to let it appear that *William Mitchell* was the owner of the premises. With the exception of the one remittance of Rs.2000 mentioned in the letter of *Nicol Fleming & Co.* of the 9th of August, 1876, and the statement of *Francis Mitchell* that a like sum had been on one occasion sent through himself, there is no evidence of payments of money by *William Mitchell* to his father. Not a single entry under the head of rent in the account books of the firm of *Mitchell & Co.* is forthcoming, nor is a letter or receipt produced from *Alexander Mitchell* acknowledging any one of the payments which are alleged to have been made on account of rent. That moneys may have from time to time been remitted from *William Mitchell* to his father by way of interest on the advances made to start him in business, is likely enough; but be this as it may, there is not a particle of satisfactory proof to shew that rent was ever paid by *William Mitchell* to his father in respect to the screw-house. Having regard to his lengthened occupation of the premises as their ostensible owner, we think strict proof should be required that he was in possession

of them in any other character, more particularly when we find that he has incurred liabilities to the extent of Rs.8912, and he has only assets to shew amounting to Rs.431."

Doyne, and *Woodroffe*, for the Appellant, contended that no *primâ facie* case of ownership on the part of *William* had been made out. The title of *Alexander* was completely established by the deed of the 31st of December, 1878, which with its schedules were clearly admissible in evidence. Act III. of 1877, sect. 49. Any irregularity of the Registrar in his indorsement was a mere defect in procedure, and did not invalidate the registration. Reference was made to Act X. of 1877, sects. 278, 280; *Mohammed Ewaz* v. *Birj Lall* (1); *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (2).

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decision of the High Court in this case was erroneous, and that it ought to be reversed.

It appears that an action was brought on the 14th of June, 1880, praying:—"That a decree for establishment of right, as provided by sect. 283 of Act X. of 1877, be passed, with the order that the disputed property is the property of *W. Mitchell*, judgment debtor, and is liable to be sold by auction in execution of the Plaintiff's decree." On the 11th of June, 1879, the Plaintiffs obtained a decree under an arbitration award against *William Mitchell*. In the execution of that decree a screw-house, which was in the possession of *William Mitchell*, was attached. Upon that attachment being made *Alexander Mitchell*, the father of the Defendant *William*, objected, and claimed that the property was not the property of *William*, but was the property of him, *Alexander*. The matter was investigated by the Court out of which the execution issued, in accordance with the provisions of the Code of Procedure; and having received evidence in the case, the

(1) Law Rep. 4 Ind. Ap. 175. (2) Law Rep. 2 Ind. Ap. 211.

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Court decided that the property belonged to *Alexander* and not to *William*, and released it from execution. That order was not appealable; but the Plaintiff, the then execution creditor, being dissatisfied with the order, the present suit was commenced, in accordance with the provisions of the Code of Procedure, to have it declared that the property was the property of the son, and liable to be seized in execution; it was in substance to reverse the order of the Court out of which the execution issued.

The way in which the father endeavoured to make out his title was this. He said that on the 25th of September, 1873, he purchased the property from Messrs. *Nicol Fleming & Co.* It appears that the deed of conveyance which he attempted to put in evidence to prove that Messrs. *Nicol Fleming & Co.* conveyed the property to him had not been registered. By the *Registration Act*—Act III. of 1877, sect. 49—it is enacted that "No document required by sect. 17 to be registered,"—and the document of 1873 was a document of that nature—"shall, unless it be registered, be received as evidence of any transaction affecting such property, or conferring such power." The deed, therefore, not having been duly registered, was not admissible in evidence. But *Alexander Mitchell* produced a subsequent deed, namely, a deed which was executed on the 31st of December, 1878. It refers to the deed of 1873, which is set out in a schedule as part of the deed of 1878. The memorandum of registration was written, not on the first sheet of the deed of 1878, but at the end of the deed which was annexed as a schedule to, and was consequently part of the deed of 1878. The deed of 1878 not only confirmed the deed of 1873, but it went on to state that the parties to the deed did, and each of them did, "according to their and his respective estates and interests, grant, convey, assign, and confirm unto the said *Alexander Mitchell*, his heirs, executors, administrators, and assigns, the piece or parcel of land"—which is the subject-matter of the dispute in this case. So that the deed of 1878 was an actual conveyance from Messrs. *Nicol Fleming & Co.* to *Alexander Mitchell*. *Nicol Fleming & Co.* were proved to have purchased it from *Gavin Sibbald Jones*, who had mortgaged it to a person of the name of *Churcher*. There is no doubt that the property having been the property of *Nicol Fleming & Co.*, passed

by that deed from *Nicol Fleming & Co.* to *Alexander Mitchell*, but it was alleged in the plaint that that deed was fraudulent and void. The fourth paragraph of the plaint says:—"The said property belongs exclusively to *W. Mitchell*, and he is in proprietary possession thereof: the sale deed is quite fictitious, collusive, and invalid, and executed without receipt of consideration money." It is not attempted to impute any fraud to *Nicol Fleming & Co.* They received the consideration money of Rs.12,406, and conveyed the estate. The fraud attempted to be made out is that the conveyance was to *Alexander Mitchell*, instead of the son, *William Mitchell*. The question is, who paid the consideration money for the conveyance? Was it *William Mitchell*, or *Alexander Mitchell?* There is no evidence to shew that *William Mitchell* had the means of purchasing the property. He had been acting merely as assistant of *Nicol Fleming & Co.* in conducting the mill for them before the sale, and he continued to occupy the premises afterwards.

It was proved that the consideration money for the conveyance was paid by *Alexander Mitchell*. It was not paid by *William Mitchell* in *Cawnpore*, but to *Nicol Fleming & Co.* in *England* by *Alexander Mitchell*, who lived in *Scotland*.

There was no evidence whatever to shew that *William Mitchell* was the real purchaser, or that *Alexander* was merely benami for him, and their Lordships think that the decision of the first Judge, that the property was *Alexander Mitchell's* and not *William Mitchell's*, was correct.

It has been urged by Mr. *Woodroffe*, and very properly urged, that it required some strong evidence to overturn the decision of the Judge of the execution Court, who, upon hearing the evidence, came to the conclusion that the property was *Alexander Mitchell's*, and he asked, Was there any sufficient evidence that it was the property of *William* given before the Judge of the first Court, who decided in accordance with the view of the Court of execution? There appears to be no evidence. The evidence, on the contrary, shews that the money was paid by *Alexander*.

The Judges of the High Court place some reliance upon the fact that the first deed was not registered in 1873. They say:—"Having established this lengthened possession on the part of

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their judgment debtor, the Plaintiffs reasonably enough contend that they have made out a *primâ facie* case, which it lies upon the Defendants to rebut. We think that this is the correct view of the position, and that it rests with *Alexander Mitchell* to prove his title. This he seeks to do in a fashion which is, to say the least of it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th of September, 1873, and the other a confirmation bond executed by the same parties as the conveyance, and dated the 31st of December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence." That document was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence, and that deed, referring to the deed of 1873, was proved to have been executed, and their Lordships consider that it was duly registered. "Now it is obvious"—the Judges say—"that the true document of his title is the conveyance of 1873; but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March, 1879, it was presented to the Collector for registration. Now even supposing registration had been formally and properly completed, we should have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed." Their Lordships do not understand what is the mischief to which the Judges allude. The *Registration Act* was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances unless those previous conveyances were registered. The *Registration Act*, as regards real property, was not

intended to be a clause similar to that which is in the Bankrupt and Insolvent Acts, by which persons who are allowed to be in the order and disposition of goods, with the consent of the real owners, are, as against creditors, to be considered the real owners.

Their Lordships therefore think that the second deed of conveyance, being registered, was a valid conveyance of the property from Messrs. *Nicol Fleming & Co.* to *Alexander Mitchell*, and that it passed that property to *Alexander*, unless there was fraud either between those who conveyed the property to *Alexander*, or between *Alexander* and his son, in taking the conveyance to *Alexander* as the person who had really purchased the property, instead of to the son, who was in possession of the property, and who it is said paid the purchase-money. Their Lordships see no evidence at all to show that there was any fraud of that kind, or between *Alexander* and his son, in having the confirmation deed of 1878 executed to the father.

With reference to the persons who paid the money, it was stated by the brother of *William* that the father had advanced the money for the purpose of promoting the interests of his son. There was some evidence given of rent having been paid by *William Mitchell* to his father for this property. It certainly was not very clearly proved that the rent was regularly paid. It was said there were letters shewing that the different payments had been made, but those letters were not produced. There certainly was one letter produced in which Messrs. *Nicol Fleming & Co.* admitted to have received a sum of Rs.2000 from *William*, in order to make a remittance to the father of £150. But the Judges put it in this way:—"Not a single entry under the head of 'rent' in the account-books of the firm of *Mitchell & Co.* is forthcoming, nor is a letter or receipt produced from *Alexander Mitchell* acknowledging any one of the payments which are alleged to have been made on account of rent. That moneys may have from time to time been remitted from *Mitchell* to his father, by way of interest on the advances made to start him in business, is likely enough; but be this as it may, there is not a particle of satisfactory proof to shew that rent was ever paid by *William Mitchell* to his father in respect to the screw-house." Whether the rent was ever paid by *William Mitchell* to his father is not the question. The ques-

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tion is, who paid the consideration money for the conveyance from Messrs. *Nicol Fleming & Co.* to *Alexander*? Their Lordships think that the evidence clearly shews that the consideration was paid by the father, and that he took the conveyance to himself. There was no evidence to shew that the father lent the money to his son, and that the son was the real purchaser. Even if the father lent the money to the son it is natural that he should take the conveyance to himself as a security for the repayment of the loan.

Under these circumstances their Lordships are of opinion that the *primâ facie* case which was made out by shewing that *William Mitchell* was in possession, has been rebutted by the evidence shewing that the father paid the consideration money for the conveyance to himself, and that the property was conveyed to him. Their Lordships therefore think that the decision of the Judge of the execution Court, that the property was the property of *Alexander*, and not the property of *William*, was correct; and that this suit must fail in asking to have that judgment reversed. The Court of first instance, in the suit which is now under consideration, concurred with the decision of the Judge of execution.

Their Lordships think the decision of the first Judge was correct, and that the High Court were in error in reversing that decision.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to order that the suit be dismissed with the costs in the High Court. The costs of this appeal must be paid by the Respondents.

Solicitors for the Appellant: *Sanderson & Holland.*

MOULVI MUHAMMAD ABDUL MAJID . DEFENDANT;

AND

MUSSUMAT FATIMA BIBI . . . . . PLAINTIFF.

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June 23, 24.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mahomedan Will—Construction—"Always and for ever" need not denote more than Life Interest—Restriction on Alienation.

The Defendant having claimed to retain exclusive possession of the property in suit subject to the conditions of a will and in order to carry out its provisions:—

Held, that, although by the will the management of the said property was given to the Defendant's father "always and for ever," that expression did not *per se* extend the interest beyond the life of the person named:

Held, further, that on the true construction of all the provisions in the will, the Plaintiff was entitled to the shares given her in full proprietary right, notwithstanding an attempt in the will to control her in the disposition thereof and to prevent her parting with them to strangers.

APPEAL from a decree of the High Court (Jan. 1, 1882), affirming a decree of the Subordinate Judge of *Jaunpur* (June 18, 1880) in favour of the Plaintiff.

The question in dispute was as to the construction of the will, which is sufficiently set out in the judgment of their Lordships, and the consequent right of the Respondent to the relief prayed by her, namely, that she should obtain actual possession by registration in the Collector's books of that share of her father's estates of which the beneficial interest was given to her by the will.

Cowie, Q.C., and *Doyne*, contended that by the true construction of the will the Appellant was entitled to succeed to his father as the manager of his grandfather's estate, subject to the Respondent's right to receive her share of the profits. The Respondent's construction tends to break up the estate and to defeat the general intention of the testator.

Graham, Q.C., and *Mayne*, for the Respondent, were not called upon.

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal arises out of a disposition of his property made by one *Imam Baksh*. The disposition, which was not strictly a will, because it was made in his lifetime and he reserved to himself some benefit under it, was made on the 19th of August, 1860, and he died about a year afterwards. At the time he made it the state of the family was this. He had two wives. By the first he had a daughter, *Mussumat Fatima Bibi*, who had had a son, *Hafiz Syud-ud-din*, then dead. He had had another daughter, *Mussumat Makki Bibi*, who had died, leaving two children, *Muhammad Ibrahim* and *Mariam Bibi*. By the second wife he had a son, *Moulvi Muhammad Haidar Hussain*, who died in July, 1875, leaving his eldest son, the present Appellant and the Defendant in the suit, and other children. The contention between the Appellant and the Respondent arose after his death. It was this, as stated in the plaint of the Respondent which was filed on the 5th of May, 1879. In that, she states the disposition of the property by her father, *Imam Baksh*, and that the management of the whole property was entrusted to *Haidar Hussain*, and after the death of *Imam Baksh*, she, the Plaintiff, confirmed him as manager, and that she had not disputed any of the rights of *Haidar Hussain*. Then, after stating that he was in possession of the property and acted as manager, and stating his death, she says that, after his death, the Defendant, without the consent and permission of the Plaintiff, improperly took possession of the property constituting her share, and asked the Revenue Court to enter his name in the place of that of *Haidar Hussain*, and that she gave notice to the Revenue Court of her dissent from that. She then goes on to say, "That the Defendant, notwithstanding his want of right, not only arbitrarily declares himself to be the manager of the whole property, but considers and represents himself to be the permanent owner of the whole property, and by his own authority, and with the view of injuring the Plaintiff, has committed and omitted to do acts calculated to cause great loss to her; and she prays that a decree may be passed in her favour, declaring her right, permanent proprietary

title and possession to her share in the property detailed below," and "that complete possession of her share may be awarded to her: that the Defendant's possession and management may be removed."

The Defendant, in his written statement, sets up this claim: "From the death of *Maulvi Muhammad Haidar Hussain* the whole property mentioned in the will and the agreement legally devolved upon and came into the possession of the Defendant under the express conditions and directions of the said documents, and with reference to inferences drawn from them. According to the terms of the will, the rules of Mahomedan law, and the principles of justice, the Defendant alone is entitled and competent to retain possession (subject to the conditions of the will) in order to carry out its provisions, which are to be carried out in perpetuity and for ever, and not for a limited period." It may here be noticed that the Defendant is not the only heir of *Muhammad Haidar Hussain*, there are other persons who are also his heirs. The contention is that although the Defendant is only one of the heirs he alone is entitled and competent to retain possession.

This being the contention of the parties, the provisions in the document may now be looked at, to see how far the Defendant's contention is supported by its provisions, and how far the right of the Plaintiff to recover in this suit is established. *Imam Baksh* begins by saying, "I had two wives married according to the Mahammadan law, one, *Musammat Hingan Bibi*, who is at present alive, and by whom I had two daughters, one, *Musammat Fatima Bibi*, who is alive, and her son, *Hafiz Syud-ud-din Mahammad Syud Bukht*, now deceased, was adopted by me as my son, and the other, *Musammat Makki Bibi*, who died, leaving one son, *Muhammad Ibrahim*, and a daughter, *Mariam Bibi*, minors. My second married wife died, and *Maulvi Muhammad Haidar Hussain*, a son by her, is alive. Therefore, according to the Mahammadan law, *Musammat Fatima Bibi*, my daughter, and *Maulvi Muhammad Haidar Hussain*, the children of my loins, are my legal heirs." He then goes on to provide that the whole income of four annas share of his villages and estates shall be devoted to charity and works of beneficence, and the remaining 12 annas of the villages and estates and the whole of his other property shall

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be divided into four "schams" (shares), and gives one share to *Hafiz Syud-ud-din Mahammad Syud Bukht*, one to *Fatima Bibi*, one to *Maulvi Muhammad Haidar Hussain*, and one to *Muhammad Ibrahim* and *Mariam Bibi*, and says:—"During my, the declarant's lifetime, they shall continue to receive the profits of those 'schams' (shares); the one 'scham' of *Hafiz Syud-ud-din Mahammad Syud Bukht* will be received by his mother, *Fatima Bibi*. She will be the owner of her own one 'scham' and of one 'scham' of *Hafiz Syud-ud-din Mahammad Syud Bukht*, in all of two 'schams.' She is at liberty to give them to anyone she may like among her own children. It will be necessary and incumbent on all the said heirs to perform all the necessary and obligatory terms of this document, which they have of their own will consented to observe, and they will not have the power to dissent from it on any plea of law or Mahammadan law." The assent which is here stated is shewn by their putting their names to the document after the signature of *Imam Baksh*. Then in the third clause he provides for what is to be done with the four annas share which was devoted to charity. He says:—"He, *Maulvi Muhummad Haidar Hussain*, shall always be the manager of this four anna share; none of the heirs shall have the right to interfere in any way in the aforesaid four anna share. It shall be incumbent on *Maulvi Muhammad Haidar Hussain* to keep the entire management in his own hands." A little lower down he says, "After *Maulvi Muhammad Haidar Hussain*, whoever from the descendants is just, virtuous, and capable of performing this duty, shall be the superintendent and manager of that four anna share. In short my, the declarant's, object is this—that the managership and superintendentship should always continue with *Maulvi Muhammad Haidar Hussain*, and after him, as specified above, whoever among the descendants is capable of performing this work." The word "descendants" there means among his own descendants—not limited to the descendants of *Muhammad Haidar Hussain;* and as far as this provision goes it would seem to point to some selection being made from amongst his descendants in order to have a person who should have the management of the charity property. Then we come, under the fifth clause, to the provision which he makes with regard to the

remainder of his property. In the fourth clause he had said what there seems to be no doubt was his wish:—"The aforesaid heirs should continue in harmony, and eat and reside together, so that being united the estate may continue to improve and the name always be preserved." In the fifth he says, "*Maulvi Muhammad Haidar Hussain* shall continue in possession and occupancy of the full sixteen annas of all the estates, villages, lands lying at different places, and moveable and immoveable property (collections from the villages). All the matters of management in connection with this estate should necessarily and obligatorily rest always and for ever in the hands of *Maulvi Muhammad Haidar Hussain.*" Here we have the words, "always and for ever." But these words, according to several decisions of this Board do not *per se* extend the interest beyond the life of the person who is named. *Per se* they are satisfied by limiting the interest which is there given to the life of *Muhammad Haidar Hussain.* The Subordinate Judge has made observations upon the meaning of these words which are quite supported by the authorities. So far, then, there is nothing in the words used by the testator to indicate an intention that the possession and management were to go to any one of his descendants after the death of *Muhammad Haidar Hussain.* He then gives directions as to the recording of the name, and goes on to say:—"No heir and no stranger shall at any time or period have, on any ground, or in any way, power to object to or oppose any of the matters above mentioned, or to take possession or to make any arrangements of his own regarding the estates. In all these matters all persons shall be entirely powerless;" shewing there an intention to keep the property in the hands of his family if possible, and that no strangers should at any time come in and have any part of it. This is still further shewn by the sixth paragraph. But before that he directs that *Haidar Hussain* is to make collections of the profits, and says that he is to pay the profits of two out of the four shares to *Fatima Bibi,* "and the profits of one seham he may take himself, and the profit of one share, that of *Muhammad Ibrahim* and *Mariam Bibi,* after deducting the expenses, he is to keep in deposit with himself," according to the provisions of a

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subsequent clause. This part clearly shews that what he intended was that during the life of *Haidar Hussain* he was to give to the parties their shares of the profits. But there is no direction that this should be done by any other person after the death of *Haidar Hussain.* The direction is applicable to *Haidar Hussain* only, who is directed himself to pay the profits. Then he says:—"My, the declarant's, real object is that all my estates may always remain in possession of my descendants as specified above"—repeating the intention previously shewn—"and no interference of any stranger on any account may be permitted therein, and my property should not be allowed to pass into the hands of any stranger. Hence I enjoin on *Musammat Fatima Bibi, Maulvi Muhammad Haidar Hussain, Muhammad Ibrahim, Mariam Bibi,* and also their descendants, generation after generation in perpetuity, that when any of them is disposed to transfer his share by sale, mortgage, or lease, &c., then he must first offer to transfer to all of his sharers in property; and so long as the sharers are willing to take it he must by no means transfer to others." There, it may be observed, he does not speak of profits. He had spoken previously of the shares and profits; but here he seems to be speaking of shares in the property, and the shares of the different persons, amongst others of *Fatima Bibi,* and he directs that they shall not transfer their shares of the property to strangers. Certainly that does not indicate an intention that the property should not be vested after the death of *Haidar Hussain* in the persons to whom he had given the shares. Then he says:—"The stranger will not have any power to take any possession or occupancy of the transferred property beyond receiving the profits which will be handed to him;" and "The purchaser also, beyond receiving the profits, shall have no power or right of possession or occupancy over the property sold; nor by the auction shall the right of possession and management be disturbed of *Maulvi Muhammad Haidar Hussain,* or whoever may be his representative." Mr. *Cowie* rightly admitted that by "representative" here is meant, not a successor of *Haidar Hussain* in the right of *Haidar Hussain* in any way, but a person who might, during *Haidar Hussain's* life, be his agent; thus again

indicating that he was making a provision rather for what was to be done during the life of *Haidar Hussain* than for what was to be done afterwards.

These are the provisions of the will, and it is difficult to see in them any provision by the settlor which would confer upon the present Defendant the right which he now claims to have. There is nothing to shew that the heirs of *Haidar Hussain* were to take his place in the succession and management, and, even if there were, there would be this difficulty, that, if it went by right of succession to the heirs of *Haidar Hussain*, they would all, and not the present Defendant alone, come in. Thus expressions clearly denoting that the management is to be in a single hand would, by a strained application of them to a period beyond the life of *Haidar Hussain*, be used to vest the management in a number of hands.

It has been contended by Mr. *Doyne* that there ought to be, and that there might be, a selection, by some sort of family council, of one of the heirs of *Haidar Hussain*, who should succeed him in the management, and, in default of any appointment by a kind of family council, that it might be made by the Court. We find in this document no provision of the kind, nothing to indicate that it was the intention of the settlor that there should be any selection; and it seems to their Lordships, whatever might have been the wish of the settlor to keep the property in the family, impossible to say that he has so framed this instrument as to carry out such an intention or to effectuate such a wish beyond the life of *Haidar Hussain*. The right of *Fatima Bibi* to her shares in the property is clear upon the terms of this instrument, unless the Defendant could shew that there were provisions in it which would control that part of it, and limit her for ever (for that seems to be the contention) simply to an enjoyment of the profits, and not to have any other interest in the property. There are words which indicate an intention that she should take an interest in the property with an attempt, no doubt, to control her in the disposition of it, and to prevent her parting with it to strangers.

It is unnecessary to allude to what is said in the judgments of the subordinate Court and the High Court. Their Lordships are

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of opinion that the conclusion they came to was a correct conclusion, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The costs of it will be paid by the Appellant.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondents: *Barrow & Rogers.*

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THE OFFICIAL TRUSTEE OF BENGAL PLAINTIFF;

AND

KRISHNA CHUNDER MOZOOMDAR AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice of the Court—Judgment must be confined to the Points in Issue.

In a suit to set aside certain orders of the Collector, and for registration of the Plaintiff's name in zemindari right after cancelling those of the Defendants, the latter set up forged deeds in support of their alleged zemindari right. The High Court, thereupon, while decreeing for the Plaintiff, declared that the Defendants were putnidars, founding this declaration upon certain statements in the Plaintiff's documentary evidence, no such claim having been put forward by the Defendants, and no issue to that effect having been raised:—

Held, that the High Court had no power to make such declaration.

Sect. 566 of Act X. of 1877 does not apply where an issue has not been raised in the lower Court.

APPEAL from a decree of the High Court (*McDonell* and *Tottenham*, JJ., May 17, 1883) affirming with variations a decree of the Subordinate Judge of *Pubna* (June 30, 1881).

The facts of the case and the proceedings in the Lower Courts are stated in the judgment of their Lordships.

The questions in the appeal related to the following portions of the High Court's decree: (*a.*) the declaration that the Respondents were putnidars of the villages in respect of which the

* *Present:*—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Appellant had been, by the concurrent decisions of both Courts, found to be entitled to be registered under Act VII. (B.C.) of 1876, as proprietor in lieu of the Respondents who unsuccessfully claimed to be zemindars thereof; and (*b.*) the direction that the Appellant should bear his own costs in both Courts.

Macnaghten, Q.C., and *Woodroffe*, for the Appellant.

Graham, Q.C., and *Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The Appellant brought a suit in the Court of the Subordinate Judge of *Pubna* against the Defendants, alleging that the whole of fifteen mouzahs named in the schedule to the plaint was the zemindary right of the late *N. P. Pogose*, and that having obtained possession with the aid of the High Court, the Appellant, as the official trustee appointed under the orders of the High Court, was entitled to and possessed of the same. And he prayed the Court to set aside an order of the Deputy Collector of *Pubna*, dated the 31st of December, 1878, and a subsequent order of the Collector, dated the 27th of March, 1879, for registration of the Defendants' names with reference to the mouzahs, and to pass a decree for registration of his name, after cancelling the registration of the Defendants' names, in zemindari right. He also asked the Court to set aside, as fabricated and fraudulent, two false kobalas, which purported to have been executed on the 8th and 15th Cheyt, 1207.

The suit was occasioned by the proceedings of the Defendants under Act VII. of 1876, who applied for the registration of their names as proprietors of certain specific portions of the estate composed of these mouzahs, and produced in support of the application the kobalas referred to. The Appellant objected, and asserted that they were dependent talookdars, and consequently were not entitled to have their names registered, but the Deputy Collector overruled the objections, and ordered the names to be registered as applied for. This order was on an

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appeal affirmed by the Officiating Collector of *Pubna*. The Defendants in their written statements relied upon the kobalas, and claimed to be co-sharers in the zemindari. Issues were framed, of which it is now necessary to notice only three. They were:—"8th. Whether the Defendants' kobala deeds are genuine or collusive; if so, whether they are liable to be set aside. 9th. Whether the Plaintiff is in possession of the disputed mehals as zemindar or not. 10th. Whether the Defendants are jimmadar under-tenure holders or zemindars of the disputed mehals." The last issue seems to have been put in this form in consequence of a statement in the plaint that the Defendants had acquired from the Plaintiff's predecessor ordinary subordinate jimmadari rights, but the question raised by it was whether the Defendants were zemindars. The Subordinate Judge decided that both the kobalas were forged, and said that they seemed to him to have been forged by the Defendants for the purpose of establishing their zemindari rights over the disputed mehals, which they held as under-tenure holders under the Plaintiff and his predecessors. He made a decree in these terms:—"That this suit be decreed, with costs, after establishment of the Plaintiff's zemindari right to the disputed mehals; that the Defendants be declared to be the Plaintiff's under-tenure holders of the said mehals; that the false kobalas and the Collector's order for registration of name be set aside; that the Plaintiff is entitled to register his name to the disputed mehal in place of the names of the Defendants in the collectorate register."

The Defendants appealed to the High Court, and, among other grounds of appeal, said the Court below ought to have held on the evidence that the Defendants were part owners of the zemindari, and not mere under-tenure holders, and that, at any rate, it ought not to have made a decree in favour of the Plaintiff, leaving the *status* and rights of the Defendants wholly undefined. The High Court agreed with the subordinate Court, that the kobalas were not genuine, and that the Plaintiff was entitled to be registered as zemindar; but they went on to say, "The learned Advocate-General wishes us simply to declare that the Plaintiff is entitled to be registered as zemindar of the property in question, to the

exclusion of the Defendants, and invites us to say nothing as to the *status* of the latter. But we are certainly not disposed, in any view of the Plaintiff's case, to leave the Defendants at his mercy, or to leave him the power of treating them in any future suit as the holders of ordinary subordinate jimmadari rights in these mouzahs, as he has described them in his plaint, or as undefined under-tenure holders, as the lower Court has pronounced them to be. On the contrary, we are of opinion that, even should we feel bound to hold that the Defendants' rights in these mouzahs fall short of absolute proprietorship, as to which technical proof seems alone to be wanting, their *status* is shewn, even by the evidence adduced by the Plaintiff, to be at the very least as high as that of putnidars, and one which cannot now be disturbed." The decree was, "It is ordered and decreed that the decree of the lower Court be set aside, and in lieu thereof it is ordered and decreed that the Plaintiff is entitled to have his name registered as zemindar in lieu of the names of the Defendants, under Act VII. (B.C.) of 1876, in the collectorate of the district of *Pubna*, in respect of the mouzahs mentioned below, and that the Defendants are putnidars of the same mouzahs." And each party was ordered to pay his own costs in that Court and in the Court below.

The Plaintiff has appealed to Her Majesty in Council against the declaration that the Defendants are putnidars. The High Court founded this declaration upon certain statements in the documentary evidence which had been put in by the Plaintiff. Their Lordships do not think it necessary to consider whether they were right in their conclusion that the Defendants were putnidars, because they are of opinion that upon the case which had been set up in the defence, and the issues which had been framed and tried by the lower Court, the High Court could not properly make such a declaration. The Defendants had not claimed to be putnidars, but had set up a false claim to be zemindars, and had attempted to prove it by forged deeds, and they ought certainly not to be in a better position than they would have been in if they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title

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would have been framed and tried by the lower Court. The proceedings in this suit were regulated by Act X. of 1877, and their Lordships do not find any provision there which would authorize the Appellate Court to do what has been done in this case. Sect. 565, which enables the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court. Their Lordships are therefore of opinion that the decree of the High Court should be varied by striking out the declaration that the Defendants are putnidars of the mouzahs and the order as to costs, and ordering that the Defendants do bear the costs of the suit in the High Court and the lower Court. They will humbly advise Her Majesty accordingly, and the Respondents will pay the costs of this appeal.

Solicitors for the Appellant: *Lawford, Waterhouse, & Lawford.*

Solicitors for the Respondents: *Watkins & Lattey.*

NILAKANT BANERJI . . . . . PLAINTIFF;

AND

SURESH CHUNDER MULLICK AND OTHERS DEFENDANTS.

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July 8, 9.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mortgagor and Mortgagee—Right to redeem—Res judicata—Apportionment—Purchaser of a Portion of Mortgaged Property.

A purchaser of a portion of mortgaged property who as Defendant in a foreclosure suit sets up a title paramount to the mortgagee, and is on his own prayer dismissed with costs as having no title to redeem:—

Held, overruling the High Court, to be bound by such order and incapable thereafter of claiming to redeem.

Held further, overruling the High Court, that the proportion of mortgage charge payable by the purchaser of a fragment of an equity of redemption cannot be ascertained in the absence of the purchasers of other fragments, or by taking an account as between himself and the mortgagee alone. Still less can such a purchaser, without any accounts being taken at all, be decreed possession of his fragment of the mortgaged property, clear of the proportion of mortgage money chargeable thereon, on payment to the mortgagee of the sum for which on the disclaimer of the purchaser he (the mortgagee) himself bought in the selfsame equity of redemption.

APPEAL from a decree of the High Court (March 16, 1882) varying a decree of the Subordinate Judge of *East Burdwan* (June 27, 1879).

The facts of the case are stated in the judgment of their Lordships.

On the 20th of May, 1879, the Appellant sued to recover possession of a moiety of the rent-free mehal *Mahabutpore* from the Respondents. *Chunder Nath Mullick* pleaded that the deeds of mortgage under which the Appellant made title were fraudulent, and that the lands in suit were not comprised therein; that the suit was barred by a former decree; that *Khogendra Nath Mullick* had acquired a preferential right to the property in suit; and that even if he should be held to have purchased only the equity of redemption therein, the Appellant was not entitled to sue for possession without having foreclosed such equity.

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The Subordinate Judge decided against the Respondents on all points, and held that the Appellant had a valid and complete title to recover possession of the lands in suit.

The High Court (*Cunningham* and *Tottenham* JJ.) altered this decree by giving the Respondents liberty to redeem the lands within six months on payment of Rs.1600 and costs, with interest, and in default thereof the Appellant to have possession. The grounds on which the High Court proceeded are as follows:—

"It is conceded that, for the purposes of the present argument, the decree against *Asutosh's* estate, 29th of August, 1866, did not constitute a charge on the property, and consequently that the commencement of the Defendants' title cannot date earlier than the 24th of December, 1866, *i.e.*, subsequent to the Plaintiff's mortgage, and that consequently the interest which the Defendants purchased was subject to the Plaintiff's mortgage, and therefore that the independent title set up in the mortgage suit, which led to its being dismissed as against them, cannot be made out.

"The question, therefore, is, whether the original Court is right in considering that the Defendants having got themselves struck out of the Plaintiff's mortgage suit on the strength of a title independent of the mortgagors, and not having chosen to assert their rights as holding under the mortgagors, are at liberty in the present suit to set up those rights, and to claim to retain the mortgaged property, now in their possession, on payment of the Plaintiff's claim against it under the mortgage. Sect. 13 of the Code provides that no Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit between the same parties, has been fully heard and determined; and Explanation II. provides that any matter which might and ought to have been made a ground of defence or attack in such former suit, shall be deemed to have been directly and substantially in issue. Now the rights of the Defendants as holding under the mortgagors, certainly constituted a matter which might and ought to have been made a ground of defence, supposing the Court not to have accepted the view that the Defendants held by a title prior to and independent of the mortgagors, and were on this ground

entitled to be discharged from the suit; and it might be contended, therefore, that this question of the Defendants' rights must be deemed to have been directly and substantially in issue. But it cannot be said that it was 'finally heard and decided,' the view taken by the Court of the Defendants' position having rendered any such hearing and decision unnecessary. We think, therefore, that the Defendants are not precluded by sect. 13 from raising the question of their rights under the mortgagors, and that we are at liberty to consider what those rights amount to.

"The order of events was as follows: The *fieri facias* proceedings were subsequent to the Plaintiff's mortgage, but previous to the institution of the mortgage suit; and the Defendant's purchase in the *fieri facias* proceedings was subsequent to the mortgage suit. Plaintiff's purchase of the mortgaged property was last of all. It has been urged with reference to these dates, that *Khogendra* having purchased subsequent to the institution of the mortgage suit, his purchase could not withdraw any portion of the mortgaged property from the operation of the decree in that suit; and, consequently, that the Plaintiff has a right to whatever he bought in execution of the decree in that suit, independent of any claim by the Defendant under the *fieri facias* sale.

"But against this it may be urged, that the sale under the *fieri facias* was in virtue of an attachment proceeding which commenced as early as January, 1867, prior to the institution of the Plaintiff's mortgage suit, and that consequently whatever could have been sold in January, 1867, could be and in fact was sold to the Defendant in July, 1867, notwithstanding that the Plaintiff had meanwhile instituted his suit.

"We think that this is the right view. The doctrine of *lis pendens* appears to be grounded on the inconvenience which would arise if mortgagors were able after action brought to alienate the mortgaged property; but it does not follow that the rule would hold good where the alienation is not by the mortgagor, but by the Court acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale of the property, had commenced before the suit was instituted.

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"We think, therefore, that the Plaintiff is not entitled, in virtue of having filed his suit previous to the Defendants' *fieri facias* purchase, to ignore that purchase and to hold the mortgaged property free from any right which the Defendants acquired by the *fieri facias* sale. We think that we are bound to give effect to the well-recognised rule that the interest of a person who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, and to hold accordingly, that the Defendants, having purchased the mortgagor's interest in the estate, viz., the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of *Asutosh*.

"The next question is, whether the Defendants, having been joined in the mortgage suit on the Plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We of are opinion that the orders passed in that suit, so far as regards the present Defendants, had no effect beyond deciding that whatever their claims might be, they could not conveniently be tried in that suit; and that consequently both parties remained at liberty to contest subsequently any matter to which the Plaintiff's mortgage or the Defendants' purchase might give rise.

"A counter-objection has been taken, that the Defendants do not offer to redeem, but take their stand on an anterior and superior title. An objection has also been grounded on the form of the present suit, and it has been urged that the Plaintiff having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed.

"We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by *Pontifex*, J., in *Kasumun-nissa Begum* v. *Nilratna Bose* (1), and to give the Plaintiff a decree for possession, conditional on the Defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the Defendants may be permitted to redeem. The Plaintiff has himself purchased several of the mortgaged properties, and he cannot therefore throw more

(1) Ind. L. R. 8 Calc. 79.

than a proportionate share of the mortgage charge on another mortgaged portion of the premises (1).

"In the present instance, the Plaintiff paid Rs.1600 as the price of the mortgaged property. And we think that the equities of the case will be met by giving the Defendants six months within which to redeem by payment of this sum together with interest at 6 per cent. from the date of the Plaintiff's purchase, the 27th of April, 1870; the Plaintiff in default of such redemption within six months to be entitled to khas possession. If the Defendants redeem, they will do so on the terms of paying all costs of this litigation. If they do not redeem, there will be no order as to costs, and the Plaintiff be entitled to khas possession."

Graham, Q.C., and *Woodroffe*, for the Appellant, contended that the Respondents had no right whatever to redeem. *Khogendra Nath* bought the property in suit prior to the Appellants' foreclosure suit, but subsequent to his mortgage. He was made Defendant to the foreclosure suit, repudiated any title to redeem, alleged a paramount title, and prayed to be and was dismissed with costs. Under those circumstances his purchase did not and could not withdraw the property purchased by him from the operation of the decree made in the foreclosure suit, which decree was for sale and under which decree the Appellant bought in the property in suit. The course which he took in that suit precluded him and the Respondents from now asserting any right to redeem. They could only now assert title paramount to the mortgagee. But even if they had a title to redeem, the terms on which they have been allowed to do so are obviously most inequitable. Those terms were that they should have the property in suit absolutely on paying to the Appellant the price which he paid in order to get in the equity of redemption.

The Respondents did not appear.

The judgment of their Lordships was delivered by—

LORD HOBHOUSE:—

In this case the Appellant was the Plaintiff and the Respondents were the Defendants in the first Court. The case raised

(1) 4 Calc. L. R. 294; 13 Moore's Ind. Ap. Ca. 404.

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between them was of this nature. In the month of October, 1866, the Plaintiff advanced money to the representatives of one *Asutosh Deb* on mortgage of his estate. There was a further charge afterwards, and the total amount advanced was Rs.30,000. In the month of December, 1866, a writ of *fieri facias* was issued by some creditors of *Asutosh Deb* upon a decree obtained by them prior to the mortgage. It does not appear at what date the seizure was effected under that *fieri facias*, but the sheriff sold the property mortgaged, amongst other property, in the month of July, 1867, and the portion now in dispute was purchased by one *Khogendra Nath Mullick*. The present Respondents claim under *Khogendra*, but the issues in the suit have not been varied by the transmission of title, and the matter may be treated in precisely the same way as if *Khogendra* was himself before the Court. In the meantime, before the sale in July, 1867, and in the month of June, 1867, the Plaintiff had instituted a suit in the ordinary form for the realization of his mortgage by foreclosure or sale. When he learnt of the purchase by *Khogendra* he applied to the Court to make *Khogendra* a party to the suit as a person having an interest in the mortgaged property. Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable, that was, *primâ facie* at all events, a right thing to do. An order was made by Mr. Justice *Macpherson* in the High Court, adding *Khogendra* as a party to the suit, and directing an amendment in the prayer of the plaint accordingly. When *Khogendra* was brought before the Court he put in a plea or written statement by which he claimed a title paramount to the mortgage. We have not got that written statement before us. We have only got statements of it by the Courts below. The Subordinate Judge says of it, "*Khogendra Nath* having entered appearance, raised divers other questions adverse to the Plaintiff's title. He, however, did not set up a defence as claiming through the mortgagors." The High Court makes a similar statement of *Khogendra's* position. So that the result was this, that *Khogendra*, being brought there as having purchased subsequent to the mortgage, sets up a paramount title, and does not accept his position as a person who is either to redeem or be foreclosed. Upon that defence being raised the case came on for settlement of issues

before Mr. Justice *Markby*, and he, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss *Khogendra*, which he did with costs. It may be mentioned that there were several other purchasers of other portions of the mortgaged property who were made parties and who also alleged paramount titles in themselves, so that the suit would have been multifarious and confused in the highest degree if it had gone on in that shape. They were all dismissed with costs. The High Court then went on to make the ordinary decree for mortgage accounts and for sale in default of redemption. It appeared to one of the dismissed Defendants, the Subordinate Judge states that it was *Khogendra* himself, that the ordinary decree was calculated to prejudice the paramount title which he claimed. While it was being drawn up, he appeared to contest it, and persuaded the Court to vary its terms in a way which he thought to be more favourable to himself. In the month of September, 1880, the property now in suit was put up to sale, and the mortgagee himself, the Plaintiff, purchased the equity of redemption for Rs.1600. At that time *Khogendra* was in possession. It is to be presumed that he got it under the sheriff's sale, but it is not exactly known how he got it; and why the Plaintiff did not then sue him for possession does not appear. There was considerable delay in bringing this suit for possession, but it has been held in both Courts that the delay is not such as attracts the law of limitation. Therefore the suit may be brought and the legal questions are just the same as if it were brought the day after the Plaintiff purchased.

This suit being brought against *Khogendra's* representatives, a written statement is put in by the only adult representative to this effect. He pleads that the mortgage was fraudulent, that it does not comprise the lands in suit, that he has a preferential title. Then he puts in the extraordinary plea that the matter was decided in his favour in the suit of 1867. Finally he complains that, being entitled to the equity of redemption, no opportunity has been afforded him to redeem the mortgage.

All the issues raised by the Defendants, excepting the right to redeem, if it can be said they have raised that issue, have been

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found against them; or in other words, it has been found that the preferential title which they alleged but did not disclose in the suit of 1867 is an entirely false and fictitious title, and that *Khogendra*, so far from being improperly made a party to that suit, was a person who had a right of redemption and no other right at all. If the truth had been known when the matter was before Mr. Justice *Markby*, in the suit of 1867, it is clear he would have held either that *Khogendra* was rightly a party to that suit, or was not simply because he had purchased *pendente lite*, and that in either case the decree must go against him, that when the mortgage accounts had been taken he must redeem or be bound by the sale.

Upon these circumstances the Subordinate Judge held that *Khogendra* was bound by the decree he himself had asked to have; that he had virtually asserted in the suit of 1867 that he could not be put to redeem but had a paramount title which could not be tried in that suit; that he was dismissed and got his costs on that ground; that he could not now be heard to say that he wished to redeem; and therefore he gave the Plaintiff a decree for possession.

It may here be mentioned that the case is a little confused by the introduction of section 13 of the Code of 1877. That section has nothing to do with this case. This is not a question whether a person is bound by a decree made in some other suit. The question is whether he is bound by the decree made in this very suit of 1867 in which the Plaintiff bought the land, and whether after that decree was passed his rights were not entirely gone.

The High Court have reversed the decree made by the Subordinate Judge, and it must be asked on what grounds they do so. The grounds are these. First they say that the suit of 1867 did not override the interest acquired by *Khogendra* at the execution sale, and then they draw this inference:—" We think, therefore, that the Plaintiff is not entitled, in virtue of having filed his suit previous to the Defendant's *fieri facias* purchase, to ignore that purchase and to hold the mortgaged property free from any right which the Defendants acquired by the *fieri facias* sale. We think that we are bound to give effect to the well-recognised rule

that the interest of a person who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the Defendants having purchased the mortgagor's interest in the estate, viz., the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of *Asutosh*." Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted; but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the Plaintiff did not ignore the purchase by *Khogendra*. So far from ignoring it, he assigned to *Khogendra* the precise position which the High Court now assign to him in their judgment, and doing so, made him a party to the suit of 1867 in order that he might redeem if he were so minded, and if he were not so minded he might be for ever shut out. It is not the case that the equity of redemption is affected by a decree in a suit to which the owner of it is not a party. He was a party to the suit, and he declined to accept the position of a party to the suit, and he insisted upon it that the Court should dismiss him and treat him as if he were not a person who could be put to redeem at all. He even did more. He insisted on being present when the order for sale was settled, and on having a voice in its terms, and he actually got them varied to his satisfaction. That is the first ground taken by the Court.

Then they go on:—"The next question is, whether the Defendants having been joined in the mortgage suit on the Plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present Defendants, had no effect beyond deciding that, whatever their claims might be, they could not conveniently be tried in that suit."

It was the paramount claims that could not be conveniently tried in that suit. If *Khogendra* had accepted the position of a person who was entitled to redeem, then, so far from his claims not being conveniently tried in that suit, he was (apart from the

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doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own shewing that he was not entitled to redeem, and on that ground he was dismissed.

The next ground is this:—"An objection has also been grounded on the form of the present suit, and it has been urged that the Plaintiff having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed. We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by *Pontifex*, J., in *Kasumun-nissa Begum* v. *Nilratna Bose* (1), and to give the Plaintiff a decree for possession conditional on the Defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the Defendants may be permitted to redeem. The Plaintiff has himself purchased several of the mortgaged properties, and he cannot therefore throw more than a proportionate share of the mortgage charge on another portion of the mortgaged premises." That doctrine of apportionment is stated somewhat broadly, and is not applied correctly. The true application of it is this, that the Court may direct accounts, to which the purchasers of fragments of the equity of redemption must be parties, with a view of settling between them all what is the proportion to be charged on each fragment. This is shewn by the case which the High Court cite from *Moore* as an authority for their decision. In that case an equity of redemption had been sold in parcels, and the mortgagee had purchased some. The purchaser of a parcel then sued the mortgagee alone for redemption of that parcel alone on payment of its proportion of the debt; and his suit was dismissed because he was bound to add the other purchasers as parties, and to offer to redeem their parcels.

It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come without bringing the other purchasers before the Court, and have an account as

(1) Ind. R. R. 8 Calc. 79.

between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

But so far from contemplating accounts between all the parties concerned, the High Court do not direct any account at all; not even the ordinary account on which a redemption decree must be founded. They go at once to say of their own discretion what shall be the price paid for this mortgaged property. They say: "In the present instance the Plaintiff paid Rs.1600 as the price of the mortgaged property. And we think that the equities of the case will be met by giving the Defendants six months within which to redeem by payment of this sum, together with interest at 6 per cent. from the date of the Plaintiff's purchase, the 27th of April, 1870; the Plaintiff in default of such redemption within six months to be entitled to khas possession." So a sale having taken place with the knowledge of *Khogendra* under the decree which gave him his costs and dismissed him as one having no interest subordinate to the mortgage, and the Plaintiff having paid Rs.1600 for the equity of redemption at that sale, he is to have the whole property taken away from him by *Khogendra* on receipt of what he has paid for the equity of redemption alone, and not to have a single farthing for that proportion of his mortgage debt which the Court themselves say ought to be charged upon the property. Nor is he to have anything for *Khogendra's* costs which he paid, or for his own costs of that suit which failed by *Khogendra* setting up a fictitious title. The hardship of such a decree upon the Plaintiff is apparent in stating the facts. Their Lordships think that it is founded upon entirely wrong grounds. It is not consistent with itself, because it does not give to the mortgagee what the Court says he is entitled to have, but besides

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the inconsistency it is founded upon wrong grounds. Their Lordships hold that *Khogendra* is bound by the decree in the suit of 1867, and that he could not, after that decree was passed, ever come in to redeem this property.

The result is that, in their Lordships' judgment the High Court ought to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to make that decree, reversing the decree of the High Court, and so restoring the decree of the Subordinate Judge. The costs of this appeal must be paid by *Chunder Nath Mullick*, who appears on his own behalf and also as next friend of the minor Respondents.

With reference to the costs their Lordships have to observe that the bulk of the record has been unduly swelled by the insertion of a schedule upwards of eighty pages in length, containing particulars of either the property in suit or the whole of the property mortgaged, it does not matter which; in either case they are particulars which could not by any possibility have come into controversy or have aided the controversy in this present appeal. They will therefore intimate their opinion to the Registrar that in taxing the costs of this appeal he shall disallow all costs occasioned by that bulky schedule.

Solicitors for Appellant: *Watkins & Lattey.*

THAKUR SANGRAM SINGH . . . . PLAINTIFF;

AND

MUSSUMAT RAJAN BAI AND ANOTHER . DEFENDANTS.

J. C.*
1885
July 2.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES, INDIA.

Indian Evidence Act (I. *of* 1872), *sect.* 32—*Deposition of deceased Mooktar—Admissibility.*

Where in order to prove a family pedigree a deposition of a deceased mooktar was tendered, but it appeared that he had no special means of knowledge, in fact no other means of knowledge but as mooktar, that he was not a member of the family, or intimately connected with it:—

Held, that it was not admissible under Act I. of 1872, sect. 32.

APPEAL from a decree of the Judicial Commissioner (Sept. 19. 1882) reversing a decree of the Additional Commissioner, *Jubbulpore* and *Nerbudda* divisions (March 30, 1882), and restoring a decree of the Deputy Commissioner, *Jubbulpore* (March 14, 1882), which dismissed the Appellant's claim.

The facts appear in the judgment of their Lordships. The question of law was as to the admissibility in evidence of a certain deposition of a deceased mooktar under Act I. of 1872, sect. 32.

Graham, Q.C., and *Hornell*, for the Appellant, contended that it was admissible. Reference was made to Act I. of 1872, sect. 32, clause 5, amended by Act XXIII. of 1872, sect. 50: *Rani Lekraj Kuar* v. *Baboo Mahpal Singh* (1).

C. W. Arathoon, for the Respondents, was not called on.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case an action was brought by *Sangram Singh* to recover possession of a mouzah called *Bargaon* against a lady of the name

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 7 Ind. Ap. 63.

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of *Rajan Bai*, her son, *Rajan Bai* being a niece of *Parmode Singh*, who was its last possessor; and the Plaintiff sought to recover this mouzah by proving his descent through six generations from one *Sada Rai*, from whom *Parmode* had been descended through some five generations.

Without determining whether or not if the Plaintiff had proved his pedigree he would be entitled to succeed, their Lordships address themselves to the question whether he has proved it. He endeavoured to prove it in this way. Some oral evidence was called which may be dismissed with the observation that it went to the effect that he had performed the funeral rites of burning the body of *Parmode*, but would be very far from establishing such a title as he seeks to set up. His main evidence consisted of certain depositions of deceased persons which he contended were admissible in evidence. Those depositions had been taken in a proceeding which had been instituted in 1863 between the two widows of *Parmode Singh* on the one side, and one *Deo Singh*, a claimant, on the other, with reference to the settlement of this mouzah *Bargaon*, and they seem to have been taken with a view to the making up of what are called the wazi-bulurj, or village papers. The first of these is a deposition of one *Hurbilas*, who was a mooktar of these ladies.

The first question which arises is whether the evidence of the mooktar was admissible for the purpose for which it was put in. It is said to have been admissible under Act I. of 1872, sect. 32. "Statements written or verbal of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstance of the case appears to the Court unreasonable, are themselves relevant facts in the following cases." And one of the cases put in sub-sect. 5 is:—"When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

It has been objected that this mooktar had no special means of knowledge, and therefore that he does not come within the

description of persons mentioned in this section. It nowhere appears that he had any other knowledge than as mooktar acting for these ladies. He is not shewn to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Therefore in their Lordships' opinion he does not come within the description of a person having special means of knowledge. But further, it appears from his deposition that he is making a statement of the case on the part of his clients rather than professing to speak from his own knowledge of facts. He begins his deposition in this way:—"They (his clients) mean to shew that the taluka of mouzah *Bargaon* was acquired by their ancestor *Sada Rai*, and has now devolved on *Mussumat Ladli Thakurani* and *Sawai Thakurani* by reason of descent according to the genealogical tree," and so on. It appears to their Lordships, therefore, on the two grounds, first, that he was not shewn to have special knowledge, and, secondly, that he did not pretend to speak from his knowledge at all, that this deposition was not admissible.

There remain the depositions of the ladies, which are very short, and which perhaps it may be convenient to read. First, there is that of *Mussumat Sawai Thakurani*, who was the younger widow of *Parmode*. She says: "*Musst. Ladli* and *Musst. Latto* are the proper heirs to the property after my death. *Delan Shah* comes after them on their deaths." *Mussumat Ladli* was the eldest widow, and it would seem that at this time she was not able to give evidence by reason of failure of her faculties. *Mussumat Latto*, with whom a settlement had been made by the Government (it does not clearly appear why), was the widow of a nephew of *Parmode Singh*, called *Abhman Singh*. *Mussumat Sawai* is asked, "Who are *Delan Shah* and *Beni Singh?*" and she says: "The genealogical tree given by *Musst. Ladli* will shew their lineage. *Delan Shah* is the legitimate son, and *Beni Singh* the offspring of a concubine." It would also appear that *Mussumat Ladli* had at one time made some statement, which is not put in. Then the lady is asked: "*Musst. Ladli* in her statement declares *Deo Singh* as the heir to the property, and the genealogical tree also shews that he bears a close relation to you; how is it then that you do not like to declare him so?" She answers: "The reason of this

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is, that when my husband, *Parmode Singh*, died, this *Deo Singh* put me to a great trouble. He tried to have the dakhil kharij made in his own name, but it was justly and rightly made in the name of *Musst. Ladli*. Similarly at the time when an inquiry of proprietary rights was going on, he skilfully induced *Musst. Ladli* to quarrel with me. Again he does not like me, and so as a matter of course I do not like him. I am pleased with *Delan Shah*, because he is of my family and is always ready to obey me. (Question) *Beni Singh* also appears from the genealogical tree to be closely related to you: what do you say about him? (Answer) I do not like even to hear his name." This lady appears to think that *Deo Singh* had a better title than the Plaintiff, but she made no mention of *Deo Singh*, because she did not like him, and she mentioned the son of the Plaintiff because she did like him.

The deposition of the next lady is as follows: She is asked: "The proprietary rights of the *Bargaon* taluka, pergunnah *Bilshei* have been conferred on you by the Government for life. Now it is asked of you who will succeed to your property after your death?" She answers, *Musst. Sawai Thakurani*, my mother-in-law, is the heir of the estate after my death. When she dies *Delan Shah*, whom she has declared to be her heir, may succeed her. I quite agree with her in the statement she has made. I have no objection to make against it."

Their Lordships agree with the Judicial Commissioner that the evidence of these two ladies is worthless. Therefore if the evidence of *Hurbilas* is struck out the Plaintiff has made no case.

The case came in the first instance before the Deputy Commissioner, who dismissed the Plaintiff's claim, thinking the evidence of *Hurbilas* was inadmissible, and if admissible not proving the Plaintiff's case. It subsequently went before the Additional Commissioner, who found in favour of the Plaintiff, he being of opinion that the evidence of *Hurbilas* was admissible on the ground that he had special knowledge, and he undoubtedly seems to have acted mainly on that evidence. Indeed there is no other evidence on which he could be presumed to act. The case came thirdly before the Judicial Commissioner, and the acting Judicial Commissioner reversed the judgment of the Additional Commissioner mainly upon the ground that the

Additional Commissioner was wrong in accepting the evidence of *Hurbilas*, it not having been shewn that *Hurbilas* had any special means of knowledge. The Acting Judicial Commissioner, their Lordships think rightly, assumed the judgment of the Additional Commissioner to have been given mainly, if not entirely, upon the ground of his believing the evidence of *Hurbilas*, and treating it as admissible. The Judicial Commissioner being of opinion that that evidence was not admissible, reversed the judgment, and accordingly the judgment of the original Court stands confirmed. It may be observed that a question was raised before the Judicial Commissioner as to whether directions should be given for the case to be sent back and evidence to be taken on the subject of the special knowledge of *Hurbilas*, but the Judicial Commissioner, in their Lordships' opinion rightly, declined to give any such directions.

For these reasons their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that this appeal should be dismissed. They will accordingly humbly advise Her Majesty to that effect. The Appellant should pay the costs of this appeal.

Solicitors for the Appellant: *Merriman, Pike, & Merriman.*
Solicitor for the Respondents: *T. L. Wilson.*

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June 19, 20; July 11.

TEKAIT RAM CHUNDER SINGH . . . PLAINTIFF;

AND

SRIMATI MADHO KUMARI AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ghatwali-tenures—Res judicata—Act X. of 1877, *s.* 13—*Adverse Possession—Act XV. of* 1877, *art.* 144.

In a suit by a ghatwal to eject the Defendants from a subordinate tenure within the ambit of the ghatwali estate on the ground that the tenure was at will only, it appeared that the father of the Plaintiff had obtained a decree against the Defendants awarding to him the whole of the compensation money paid in respect of land formerly included within the tenure in suit, on the ground that the Defendants were merely tenants at will:—

Held, that this was *res judicata* in the Plaintiff's favour under Act X. of 1877, sect. 13:

Held, further, that possession of such a tenure is not adverse to the ghatwal within the meaning of Act XV. of 1877, art. 144, until some definition or assertion of adverse right has been made between the parties, which in this case was within the statutable period.

APPEAL from a decree of the High Court (July 27, 1882), reversing a decree of the Subordinate Judge of the *Sonthal* pergunnahs (Nov. 26, 1880) and dismissing the Appellant's suit as barred by limitation.

The suit was brought by the Appellant as the ghatwal of the *Pathrole* estate, one of the ghatwali mehals of *Sarut Deoghur* estate in zillah *Birbhoom*, to resume a portion of that ghatwali estate known as *Turuf Lalghur* in the Respondents' possession.

The facts appear in the judgment of their Lordships.

The following is the material portion of the judgment of the High Court (*Tottenham* and *Mohendranath Bose*, JJ.)

"The main contention which we have to consider in the appeal of the Defendants is, that the suit is barred by limitation; and on the merits, it has been urged, that the grant to *Kanhia Lal* was on various considerations a valid one, binding upon the successors of the grantor. Obviously, we must first deal with the

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

question of limitation. The learned counsel for the Appellants submitted that, inasmuch as the grant had been in force for more than sixty years before the suit was brought, it was protected by sect. 3 of Reg. II. of 1805. But we think that that regulation having been repealed, its provisions cannot avail the Defendants, unless it be shewn that while it was still in force the Defendants had already acquired an indefeasible title, by sixty years' enjoyment of the property, under the grant made by *Digbijoy Singh*. But the regulation had already become obsolete when it was repealed by Act VIII. of 1868; and although it was alleged that the grant was made before the permanent settlement, we have no evidence in its favour earlier than a receipt for the rent of the year 1211 B.S. (1804–5 A.D.) "It has not been shewn to us that a good title by sixty years' possession had become perfected while the regulation was still operative, and it apparently ceased to be operative when Act XIV. of 1859 came into force in 1862.

But limitation is pleaded on another ground, viz., that conceding that the Plaintiff, as ghatwal, was not bound by the act of his remote ancestor and predecessor, or by the ratification of that act by his more immediate predecessors, still he would be bound to sue to enforce his right to set it aside within twelve years of the accrual of that right, or within twelve years from the date when the possession of the Defendants became adverse to him. And for this contention we find authority in *Babaji* v. *Nana* (1), and in *Petambar Baboo* v. *Nilmony Singh Deo* (2). The Plaintiff's father and immediate predecessor as ghatwal, died in 1865, so that the possession of the Defendants then became adverse to the Plaintiff, and notwithstanding his minority, which terminated in 1873, limitation then commenced to run; but the suit was not brought until fourteen years afterwards. When the Plaintiff reached his majority there were still four years remaining within which he might have brought the suit, but he allowed a further period of two years to elapse; and it lies upon him to shew that his suit is not barred by limitation.

"For the Plaintiff it was contended that the suit is not barred, because it is one by a landlord to recover possession from a tenant, for which the law allows a period of twelve years running

(1) Ind. L. R. 1 Bombay, 535–7. (2) Ind. L. R. 3 Calc. 793.

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from the date when the tenancy is determined; and it is alleged that the tenancy was determined only in 1875, when the Plaintiff refused to accept the rent tendered by the Court of Wards on behalf of the Defendants. Plaintiff claims a period of twelve years from 1875, and his suit was brought within four. The lower Court has held that if the Defendants be considered merely as tenants, no question of limitation arises; but that if the title set up by the Defendants as mokurruridars gives them a right to plead limitation against the Plaintiff, the limitation will run only from the date when Plaintiff had notice of the claim to such title; and upon the evidence the Court held that the first notice of it to the Plaintiff was in 1875, when the suit for the compensation-money above mentioned was brought. Thus, it was held that the suit was not barred by limitation.

"We think it is clear that the article in the Schedule No. 2 of the Act, which provides for a suit by a landlord to recover possession from a tenant, and gives twelve years from the determination of the tenancy, refers to suits in respect of tenancies in which leases have expired, and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the Plaintiff seeks to recover from the holder of a title permanent in its nature.

"It is certain that the Defendants are in possession of the property in suit by virtue of a title which, if valid, is of a permanent character not determinable by notice from the Plaintiff. If it is not valid, the Defendants can only be got rid of by a suit in which they are entitled to plead and to shew that they are protected by the rules of limitation. Then, if the Plaintiff be considered to be a reversioner, the period of limitation runs from the date when his estate fell into possession, viz., the date of his father's death in 1865, and in this view we should be compelled to say that his suit is too late. It was argued, that as he was formally appointed to be ghatwal only in 1873, after he came of age, the twelve years should be counted from that date; but we are of opinion that this contention is untenable, for he was practically invested with the ghatwali when his father died, and the estate was taken on his behalf under the management of the Court of Wards. The perwana of appointment of ghatwal in

1873 was a mere formal imposition upon him of the duties and responsibilities of the office which during his minority he was incompetent to undertake.

"And if the suit be treated as one to which no article of the schedule specially applies, then it is one which must be brought within twelve years from the time when the possession of the Defendants became adverse to the Plaintiff; and in such case, too, it is clear that the succession has been adverse from the moment of the Plaintiff's succession in the room of his father.

"As regards notice to the Plaintiff of an adverse claim on the part of the Defendants, we think that it is not a case in which any special notice was required. It is not a case as between a zemindar and a ryot, who, having been dealt with as an ordinary ryot, sets up a mukurruri claim. Here the Plaintiff is a ghatwal, and, *ipso facto*, claims the right of khas possession of the whole of the ghatwali property. It is not pretended that the Defendants or their predecessors were ever considered to be ordinary ryots, or to hold under any title less than that of a mokurruri khorposh grant. We hold, therefore, that there is no valid ground for the contention that limitation did not begin to run against the Plaintiff in 1865, when his father, the last ghatwal, died. And we must hold that the suit is barred by limitation, and should have been dismissed on that ground by the lower Court.

"This finding makes it unnecessary to inquire further into the validity of the grant made by *Digbijoy Singh* to *Kanhia Lal*. We may observe, however, that it could not be affected by Reg. 29 of 1814, as it was made before that regulation was passed. Our decision on the question of limitation renders it unnecessary also to dispose of the Plaintiff's plea of *res judicata*."

C. W. Arathoon, for the Appellant, contended that the suit was not barred by limitation: *Shaikh Nujmooddeen Hossien* v. *Lloyd* (1). The death of the father was not the date from which the statute would run any more than the death of the grandfather. The possession was not adverse until there was an assertion of adverse right; till then it was the ordinary possession by a tenant. The tenure was not of a permanent character, and had been so held by *Mitter*, J., in the previous litigation as to compensation money.

(1) 15 Suth. W. R. 232.

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He held that the Defendants were tenants on sufferance, and that decision was a bar to this suit under Act X. of 1877, sect. 13. Upon the merits these ghatwals are regulated by Reg. 29 of 1814, sect. 2, according to which tenures of the permanent character contended for could not be created by the ghatwals: *Grant* v. *Bangsi Deo* (1); *Binode Ram Sein* v. *Deputy Commissioner of the Sonthal Pergunnahs* (2); *Petambar Baboo* v. *Nilmony Singh Deo* (3); *Tukaetnee Goura Coomaree* v. *Mussamut Saroo Coomaree* (4).

Graham, Q.C., and *Woodroffe*, for the Respondents, contended that the suit was barred by limitation on the grounds stated by the High Court. The possession became adverse as far back as 1857. The plea of *res judicata* is not sustainable, for in the former proceeding the Respondents were not duly represented as required by the *Court of Wards Act* (IV. of 1870, *Bengal*). The lands in suit were validly granted for the maintenance of a junior branch of the family of the ghatwal. The condition of the tenure was the due performance by the grantee and his heirs of ghatwali services, subordinate to the ghatwal of the parent estate. Even if the tenure had its inception after the permanent settlement of *Birbhoom*, it was not an illegal alienation when regard is had to its object and conditions. Reference was made to *Rajah Nilmoni Singh* v. *Bakranath Singh* (5); *Grant* v. *Bangsi Deo* (6); *Rungolou Deo* v. *Deputy Commissioner of Beerbhoom* (7); *Hurlal Singh* v. *Jorawun Singh* (8); *Sartukchunder Dey* v. *Bhagut Bharatchunder Singh* (9); Act X. of 1870, sect. 39; *Rao Bahadur Singh* v. *Mussamut Jawahur Kuar and Another* (10).

C. W. Arathoon, replied.

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The judgment of their Lordships was delivered by

LORD MONKSWELL:—

Tekait Ram Chunder Sing, ghatwal of a large estate named *Pathrole*, brings the action to eject from *Lalgurh*, a subordinate

(1) 6 Beng. L. R. 652.
(2) 7 Suth. W. R. 178.
(3) Ind. L. R. 3 Calc. 793.
(4) 2 Suth. P. C. 808.
(5) Law Rep. 9 Ind. Ap. 104.
(6) 6 Beng. L. R. 652; S. C. 15 Suth. W. R. 38.
(7) Marshall, 117.
(8) 6 Sel. Rep. 168.
(9) S. D. A., 1853.
(10) Law Rep. 11 Ind. Ap. 75.

tenure within its ambit, the Defendants, who are widows of the last holder of it, *Bunwari Sing*, and are under the protection of the Court of Wards. He claims the right to resume that tenure at will, and further asserts that his right to this resumption has been conclusively decided in a previous suit between the same parties. The Defendants claim to hold a ghatwali tenure, from which they could not be dispossessed, on the payment of a fixed rent; they deny that the question had been decided as alleged, and set up the plea of limitation. The Subordinate Judge found for the Defendants on the plea of *res judicata* and for the Plaintiff on the plea of limitation, and gave the Plaintiff a decree on the ground that the tenure was resumable at will.

The High Court reversed this judgment, finding for the Defendants on the plea of limitation only. From that judgment the present appeal is preferred.

The following facts appertain to the history of the tenure.

One *Digbijoy Singh* was the ghatwal of *Pathrole* about the beginning of this century.

The property held by the Defendants called *Turuf Lalgurh* was granted by him to one of his younger sons, *Kanhia Singh*, for maintenance in or before 1804: for receipts of rent are put in, one in 1805 for rent due in 1804.

In 1800 or 1801 a settlement for ten years seems to have been made with *Digbijoy*, another settlement at the expiration of that for three years, and another in 1813–14 for ten years, which became permanent by the operation of Regulation 29 of 1814. We hear little or nothing more about it till 1853, when a proceeding took place before the Judge of *Birbhoom*, which arose in this way. Some creditors who had obtained decrees sought to execute them against the owners of ghatwalis, among them *Barat Chunder Singh*, grandfather of the Plaintiff, ghatwal of *Pathrole*, and *Kanhia Singh*, ghatwal (as he described himself) of talook *Lalgurh*. The ghatwals contested the right of judgment creditors to seize their estates in execution, whereupon an order was made for the release of the estates from attachment, which was confirmed on appeal to the Sudder Dewani Adawlut in May, 1853. The Court gave judgment in these terms:—

"The Court are of opinion that, under the law, the ghatwali

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tenures of *Birbhoom* being not the private property of the ghatwals, but lands assigned by the State in remuneration for specific police services, are not alienable, nor attachable for personal debts."

In a similar proceeding in 1857 a decision to the same effect was arrived at, and a notice was sent to *Bharat Singh* that the grant to *Kanhia* had not given *Kanhia* any right in mouzah *Lalgurh*, but as far as we know *Bharat* took no action on this, nor does any assertion or counter-assertion of rights appear to have taken place between the holders of *Pathrole* and the owners *Lalgurh*, till the time which will be hereafter referred to. It further appears that the owners of *Lalgurh* have been treated as bound to perform, and, indeed, have performed the police duties incident to their tenure; this is recognised by a perwana from *Barat* to *Bunwari* in 1855, and by a further perwana from the Assistant Commissioner of the *Sonthal* pergunnahs in 1873.

The first question in the case to be determined is, whether the contest of title between the parties is *res judicata* under Act X. of 1877, sect. 13, which is in these terms:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they or any of them claim, litigating in the same title."

The Plaintiff's father died in 1865, leaving him a minor. During his minority, which ended in 1873, the rent of *Lalgurh* was paid by *Bunwari* to the Court of Wards on his behalf, and no question of title or conflicting right arose. On his attaining majority some time in 1873 he brought a suit against *Bunwari*, claiming against him the whole of the compensation money which had been paid into Court by the *East India Railway Company* in respect of land in *Lalgurh*, which had been taken by the company, *Bunwari* claiming a share in that money.

Pending the suit *Bunwari* died, his widows were substituted for him, and the Subordinate Judge decided in their favour, giving them a considerable part of the compensation money.

On appeal to the High Court this judgment was reversed.

The contention of the respective parties, and the ground of the judgment, are so clearly stated by Mr. Justice *Romesh Chunder*

Mitter, that their Lordships think it well to give the following extracts from his judgment:—

"This suit was instituted on behalf of *Ram Chunder Singh*, minor, who has now attained his majority, for obtaining Rs.15,125. 11*a*. 6*p*., deposited in the Government Treasury of *Doeghur*, being the compensation money for 1765*b*. 9*c*. 14*ch*. of land appertaining to the ghatwali talook *Pathrole*, taken for the construction of a railway. The allegation of the Plaintiff is that he is entitled to the whole of this compensation money, and, the Defendants having unjustly claimed the same, it has been detained in the Treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court. . . . .

"The Defendant *Bunwari Lal* alleged in his written statement that he holds sub-tenure in the Plaintiff's ghatwali mehal, charged with a fixed annual rent of Rs.104; that a portion of the lands taken falls within his sub-tenure, the compensation money in respect of which was therefore due exclusively to him." . . . .

Then after disposing of certain claims by other parties, the learned Judge continued:—

"Then we come to the claim put forward by *Bunwari Lal*. It is evident that he held a subordinate tenure within the Plaintiff's ghatwali mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that this tenure was created by an ancestor of the Plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the Plaintiff that it is not sufficient to shew that *Bunwari Lal* during his lifetime was in possession, and his legal representatives are still in possession of this subordinate tenure, but that it must be established that *Bunwari Lal* was, and the widows are still, in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These Defendants, it appears to me, are not entitled to any share in the compensation money, if it can be shewn that they are allowed to remain in possession of the subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the Plaintiff, it follows that the

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arrangement made by his ancestor to provide for the maintenance of a junior branch of the family is not binding upon him. He is fully competent to resume possession of these lands (*vide* 6 Beng. L. R. 652).

"*Bunwari Lal*, therefore, not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation money, the whole of which, therefore, should be paid to the Plaintiff.

"But the Plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwali mehal during his life, without power of alienation. The compensation money in deposit is only a money equivalent to a portion of that mehal."

From this judgment there was no appeal. Their Lordships are of opinion that the very question in this cause, viz., whether the Defendants held a permanent tenure, or whether the Plaintiff was entitled to resume it at pleasure, was directly and substantially in issue between the parties, and has been finally decided between them.

Their Lordships are relieved, therefore, from deciding what the rights of the respective parties really were, a question which, if it had been open, might have been attended with difficulty.

The question of limitation remains. The provision in art. 144 of the second schedule of Act XV. of 1877, which gives twelve years as the period of limitation from the time "when the possession of the Defendant becomes adverse to the Plaintiff," appears the only provision applicable to the case.

Their Lordships understand the judgment of the High Court to be, in effect, based on these considerations.

The tenure set up by the Defendants, being of a permanent character, was adverse for a long period of time to the claim of the Plaintiff and his ancestors, which was to resume the tenure at will; that it was not the less adverse on account of the payment of rent, which was an incident of the tenure; that the statute began to run against the Plaintiff on the death of his father in 1865, when his title accrued, although he was not recognised by the Government as ghatwal till his majority; that as he did not

bring this suit till five or six years after he became of age, he was barred by the statute. Their Lordships are unable to assent to this view.

It can scarcely be contended that immediately on the creation of the sub-tenure the possession of it became adverse when there was no dispute or conflicting claim. If not so, when did the possession become adverse? It has been contended that it became adverse in 1853, when notice was given by the Court to *Bharat Chunder* that the grant to *Bunwari* conferred no title against him, and that he could eject *Bunwari* at pleasure. But the proceeding was wholly between creditors and ghatwals holding tenures, or under tenures. There were no proceedings hostile or otherwise between the ghatwals and the sub-tenure holders, each of whom was content to go on as before without any definition or assertion of right by either party. The same state of things continued after the death of *Khargdhari Singh*, the Plaintiff's father, when the rent was paid to the Court of Wards on behalf of the Plaintiff during his minority.

In their Lordships' opinion no adverse possession, within the meaning of the statute, is proved to have existed until the institution of the suit in 1873, when the claims of both parties were undoubtedly adverse, and the statute began to run only from that time. If so, the Plaintiff is not barred by limitation.

On these grounds their Lordships are of opinion that the judgment of the High Court must be reversed, and judgment given for the Plaintiff, and they will humbly advise her Majesty to this effect. The Respondent must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*
Solicitor for Respondents: *H. Treasure.*

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July 8.

AKHOY CHUNDER BAGCHI AND OTHERS PLAINTIFFS:

AND

KALAPAHAR HAJI AND ANOTHER . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Simultaneous Adoption—Construction of Power to adopt.

A Hindu gave to his two widows the following power: "You *S.*, the elder widow, may adopt three sons successively; and you *B.*, the younger widow, may adopt three sons successively":—

Held, that this did not, on its true construction, purport to authorize a simultaneous adoption:—

Held, also, that Hindu law does not allow simultaneous adoptions.

APPEAL from a decree of the High Court (May 18, 1882), affirming a decree of the Judge of *Rungpore* (Dec. 18, 1880), which reversed a decree of the Moonsiff of *Gaibanda* (July 6, 1880), and dismissed the Plaintiffs' suit with costs.

The facts are stated in the judgment of their Lordships.

The judgment of the High Court (*White* and *Macpherson*, JJ.) was as follows:—

"We have come to the conclusion that a simultaneous adoption is not valid according to the Hindu law.

"Mr. Justice *Phear* in *Sidessury Dossee Dasi* v. *Doorga Churn Sett and Others* (1), came to the same conclusion. His reasons for the decision are to be found in an elaborate judgment which that learned Judge gave in *Monemotho Nath Dey* v. *Anunt Nath Dey and Another* (2). The latter case was appealed to a bench consisting of *Peacock*, C.J., and *Trevor* and *Sumbhu Nath Pundit*, JJ., who reversed, indeed, the judgment of *Phear*, J., but on another and distinct ground. As regards the validity of a simultaneous adoption, *Peacock*, C.J., says:—'It is not necessary to go to the extent to which the learned Judge below went, or to say that a simultaneous adoption must be bad.' In another case, *S. M. Moni Dasi* v. *S. M. Prosunno Nath Dasi* (3), the same question again

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 2 Ind. Jur. (N.S.) p. 22. (2) 2 Ind. Jur. (N.S.) p. 24.
(3) 2 Ind. Jur. (N.S.) 18.

arose, but was again not decided, the Court there saying :—'It is not necessary to say whether, if the widow had adopted two sons at the same time, they would have been regularly adopted sons according to Hindu law, and so capable of being heirs of the testator.' The judgment of *Phear*, J., therefore, on this point has never been overruled, although it has not been affirmed by an Appeal Court.

"*Phear*, J., discusses the conflicting authorities with the greatest fullness and minuteness. Having read and considered that judgment, we think that the learned Judge has deduced the right rule from the authorities.

"He lays down the rule in these words :—'The power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not extend to enabling him to do more than is, at the time of exercising it, reasonably sufficient to satisfy the purpose for which the law exists. Consequently, supposing the occasion for exercising the power to have arisen, one son, and one alone, can be adopted.' The words 'reasonably sufficient' might be taken to mean what a reasonable man might think sufficient to ensure his happiness in a future world; but the context shews that the learned Judge really meant that the exercise of the power of adoption must be limited by the necessity of the case.

"Applying that rule, it follows that as the adoption of one son alone is actually necessary, and is in itself wholly sufficient to satisfy the purpose of the law, the adoption of two is not within the scope of the power, and that where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each, and also at the same time."

Mayne, for the Appellant, contended that the adoption was valid, and that the objections to it did not arise upon the pleadings and issues. He cited, besides the cases mentioned in the judgment of the High Court and relating to simultaneous adoptions, *Shyama Charan's* Vyavastha Darpana, p. 767.

Doyne, and *Woodroffe*, for the Respondents were not called upon.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought for the rent of some property which was part of an estate formerly belonging to one *Kali Krishna Lahiri.* He died in 1851, having had two wives, the elder, *Shama Soondari Debi*, and the younger, *Brahmamoyi Debi.* By *Shama Soondari Debi* he had one son. *Koilas Chunder Lahiri*, who died in 1856. After the death of *Koilas Chunder Lahiri* the two widows simultaneously, as has been found by the Lower Appellate Court, adopted sons. *Shama Soondari* adopted one *Suresh Chunder*, and *Brahmamoyi* adopted *Jogesh Chunder.* That adoption took place in 1859, on the 5th of June. *Suresh Chunder* died in 1866, and *Jogesh Chunder* in 1867. Some seven or eight years after the death of *Jogesh Chunder*, each of the two widows made another adoption, which are found by the Lower Appellate Court to have been simultaneous, and no question will arise whether one was at any moment of time before the other. These adoptions were made on the 30th of July, 1875.

The suit was brought by *Gyanendra*, the son who was adopted by the younger widow on that occasion, against a tenant of some of the land, and against *Shama Soondari Debi. Norendra*, the son who was adopted by *Shama Soondari Debi*, is not a party to the suit. The claim for rent is founded upon a lease which was executed on the 12th of February, 1870, by both the widows reserving a certain rent, and there is no question now as to whether the amount for which the decree was passed is correct or not.

The only question raised in the case is whether upon what has taken place *Gyanendra* is entitled to recover half of the rent reserved by the lease; and it may be material to see, before the facts are adverted to, how the case is stated in the plaint. It says:—"The late *Brahmamoyi Debi*, mother of the said minor *Gyanendra Chunder Lahiri*, being, in right of her husband and deceased adopted son, entitled to and being jointly and in equal shares with Defendant No. 2,"—that is *Shama Soondari*—"possessed of pergunnah *Muktipore* and others mehal No. 187 of the Collectorate towzi of zillah *Rungpore*, being the ancestral

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zemindari which the said minor is entitled to and possessed of, died on the 2nd of Falgoon, 1285, leaving her surviving the said minor taken in adoption by her as the sole heir of her and her late husband and son, and as the proprietor of the property." The case seems to be put upon the ground that after what had taken place, *Brahmamoyi Debi* was entitled to half of the estate, and that her adopted son succeeded to that half.

Now, according to the pedigree, upon the death of *Koilas Chunder Lahiri*, *Shama Soondari* would succeed to the property as his heir; but it is contended that the widows having the authority to adopt, the adoption of *Norendra* and *Gyanendra*, if it were valid, would divest the estate from *Shama Soondari Debi* and also from *Brahmamoyi Debi* if she took an interest in it, and would make the adopted sons entitled to the estate in equal shares. So that the case really depends upon the validity of the adoptions which were made by the two widows on the 30th of July, 1875.

Now as to those adoptions two questions arise. The first is whether the authority which was given to the widows by the husband authorized such an adoption as they made; and, secondly, whether, supposing he gave such an authority, it is one which the Hindu law allows. The document itself was not produced, but the contents were deposed to by two witnesses. One of them, *Kashi Chunder*, said it was as follows:—"You, *Shama Soondari*, the elder widow, may adopt three sons successively, and you, *Brahmamoyi*, the younger widow, may adopt three sons successively, and that (or those)"—the word being capable of being translated both in the singular and the plural—"adopted son (or sons) will be entitled to offer pind," &c. Another witness deposed to there being the words introduced "and on that being exhausted;" but the Lower Appellate Court seems to have thought it doubtful whether reliance could be placed upon the memory and impartiality of that witness, and the construction of the document must be taken upon the words stated by *Kashi Chunder*.

It appears to their Lordships that these words might be reasonably construed as giving to the widows, not a power to adopt simultaneously, but first to the elder widow power to adopt three sons successively, and then a similar power to the younger widow. The words are capable possibly of another construction, but

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certainly rather the more natural construction would be that it was a power to adopt successively. It may be observed that if it gave to the younger widow a power to make an adoption simultaneously with an adoption by the elder widow, the elder widow would not be able to adopt three sons successively, because there would be interposed an adoption of a son by the younger widow. That seems to be a reason for not putting such a construction upon the words.

Another reason for putting the construction upon it which their Lordships think is the right one, is what appears to be the state of the law on the subject of simultaneous adoptions at the time when this authority was given, because if it should even appear that the law was in such a state that it was extremely doubtful whether simultaneous adoptions could be made, or that from the state of the law it was not likely that there was a practice of that kind, that would be a reason for construing this document as not intended to give a power of simultaneous adoption. In construing it their Lordships would consider that the person giving the authority intended his widows to do that which the law allowed, and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus.

Their Lordships are therefore of opinion upon that part of the case that this document did not give to the two widows an authority to make such an adoption as was made by them in July, 1875, when they professed to adopt the two sons *Norendra* and *Gyanendra*.

But then there is the other question whether, if the authority did allow them to adopt in this manner, it could be done lawfully according to Hindu law. It had been clearly settled by this Committee in the case of *Rungama* v. *Atchama* (1), that a man having an adopted son could not during the life of that adopted son adopt a second son. The authorities were very fully gone into; and although there appeared to be a conflict of opinions amongst the pundits upon the subject, that was decided by this Committee. That case, no doubt, is distinguishable from the present. A simultaneous adoption in some respects would differ from the adoption of a son when there was already one son in existence, and the reason given for not allowing such an

(1) 4 Moore's Ind. App. Ca. 3.

adoption is that there are different texts which seem to direct that the power of adoption is only to be exercised where the person adopting has not a son, either a natural-born or an adopted. But much of the reasoning upon which that case was decided applies to the case of a simultaneous adoption. The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu law, is that no authority and no text has been, or apparently can be produced, shewing that the Hindu law allows it. It is true that the texts with regard to adoptions are but few, but still they are sufficient to lead to the conclusion that if it was intended that such a power as this should be given to a man with regard to adoption, there would be something in the different authorities in favour of it. That it was not intended by Hindu law may be inferred from the provisions which are made for the case of a son being born after a man has made an adoption. It is laid down by *Macnaghten* that if a son is born after a son has been adopted, the property is to be divided between the adopted son and the natural-born son in certain proportions, giving, in the case of there being only one adopted son and one natural-born son, to the adopted son a third, according to the law of *Bengal*, and a fourth according to the doctrine of other schools. Then he goes on to speak of the cases where there are more than one natural-born son, and he states the law for the distribution of the property in such cases. But no reference is made in any of the cases to there being more than one adopted son; and as the power of a Hindu either to adopt himself, or to give to his widows the power to do so in his place, depends upon the law, it seems to their Lordships that it is incumbent upon the party who seeks to avail himself of a simultaneous adoption to produce some authority to that effect. The entire absence of any authority in favour of such an adoption is an argument that the Hindu law did not recognise it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some authorities would have been found on the subject.

There is a great absence of decisions upon the question; in fact their Lordships have only been referred to one case in which the question of the validity of a simultaneous adoption has been

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considered, and that is a case in the High Court of *Calcutta*, reported in *Bourke's* Reports at page 189. There it was held by the learned Judge who tried the case that an adoption of this description was invalid, and in a subsequent case the same learned Judge acted upon the opinion which he had thus given.

So far, then, with respect to there being any authority about it. But there is a note in a recent book published by *Shama Charan Sarkar*, the author of the Vyavastha Darpana. It is called the Vyavastha Chandrika, and in vol. ii., page 118, of the Precedents, there is this note:—"It may on the whole be safely concluded that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons or the affiliation of one by a person who has a son (either his own issue or adopted) living, is now illegal according to the concurrent testimony of the most approved authorities." This is the note of Mr. *Macnaghten*, Hindu Law, vol. ii., p. 201; but it is given without any comment or indication of dissent. Their Lordships do not refer to this book as being any authority as to what the law is. The author, a Hindu gentleman who is well conversant with the Hindu law, and who must also be well conversant with the customs of Hindus with regard to adoption, appears to consider a simultaneous adoption to be illegal; he does not suggest that what is stated is in any way contrary to the habits of Hindus, or in conflict with their usages. But independently of this, and without placing any reliance upon this book as an authority, they are of opinion that by the Hindu law an adoption of this description was not allowed. Therefore, on both grounds, that the power given by the husband did not authorize the widows to make such an adoption as this, and also that the law did not allow it, even supposing the husband had intended to give such an authority, their Lordships are of opinion that the Plaintiff has failed to make out his title to recover any portion of the rent which he has sued for.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be affirmed and the appeal dismissed, and the Appellant will pay the cost of the appeal.

Solicitors for the Appellants: *Oehme & Summerhays.*
Solicitors for the Respondents: *Watkins & Lattey.*

TOOLSHI PERSHAD SINGH AND OTHERS. DEFENDANTS;

AND

RAJAH RAM NARAIN SINGH . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

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March 13, 18; June 13.

Construction—"Istimrari mokurruri"—Ba farzandan—Naslan bad naslan—Conveyance of Hereditary Right.

The words "istimrari mokurruri" in a pottah do not *per se* import an estate of inheritance.

But the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, may shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual.

The words "ba farzandan" or "naslan bad naslan" are not essential to convey an hereditary right.

APPEAL from a decree of the High Court (July 31, 1882) affirming a decree of the Subordinate Judge of *Bhagulpore* (Jan. 4), 1881.

The sole question in the appeal was whether an istimrari mokurruri pottah granted by *Rajah Nirbhoy Singh* the Respondent's grandfather and predecessor in title, to his son-in-law, *Sarnam Singh*, on the 7th Bhadom, 1257 F. (29th August, 1850), enured on the death of the latter to the benefit of his sons, the Appellants.

The facts appear in the judgment of their Lordships.

Both Courts in *India* held that such pottah did not create and was not intended to create an heritable interest in the lands therein comprised, and was granted in accordance with a custom prevailing in the raj family of *Gidhowr;* which whilst entitling the younger male members of such family, who but for the impartibility of the estates appurtenant to the raj would have been co-sharers therein, to the grant of heritable leases at permanently fixed rents, enabled the Rajah for the time being to provide for other relatives and connections by the grant of leases at fixed rents, permanent only for the lives of the grantees.

Both Courts also found that the pottahs granted to such younger

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male members, invariably contained the words naslan bad naslan (generation after generation), or other like expressions importing heritable right, whilst the pottahs granted to other relations or connections, such as sons-in-law, are devoid like the one in suit of any such words or expressions.

The following are the reasons given by the Subordinate Judge for holding that the istimrari mokurruri pottah in suit did not create an heritable interest descendible to his heirs:—

"The substance of my remarks is this, that at the time of *Rajah Nirbhoy Singh*, two descriptions of mokurruris were granted; that is, one was granted to the male members of the family, who would become heirs according to the Shastra, and in it, in addition to the words 'istimrari mokurruri,' the words 'with children' and other words having similar meaning were inserted; and the other was granted to the sons-in-law and other relatives, and in it, besides the words 'istimrari mokurruri,' no other words, 'with children' or any other word having the same meaning were inserted. Under the circumstances, it is certain that *Rajah Nirbhoy Singh*, and those to whom the mokurruris were granted, knew that there were two separate meanings of the two different mokurruris; because if both the mokurruris were known to mean the same thing, there was no necessity for writing mokurruris of two descriptions. Now let us see what are those two meanings. In my opinion there is no third meaning besides these two meanings; namely that the deeds in which, besides the words 'istimrari mokurruri' the words 'with children' or any other words having the same meaning were written, were perpetual mokurruris to be enjoyed generation after generation, while the mokurruri deeds in which merely the words 'istimrari mokurruri' were written, were taken to be tenable for life. Besides this, when I see those acts which were done after the death of the mokurruridars in whose deeds only the words 'istimrari mokurruri' were specified, the particulars of which I have stated above, it appears that the meaning of 'istimrari mokurruri' was in the family of Plaintiff taken to be for life; and those who obtain mokurruris of that description also took the same meaning. When I consider the above two facts in reference to the ordinary meaning of the words 'istimrari mokurruri,' as then understood

and interpreted by Courts of Justice, I am all the more satisfied that *Rajah Nirbhoy Singh* also took the meaning of the words 'istimrari mokurruri' to be mokurruri for life, and that the grantees of such pottahs also took the same meaning."

Graham, Q.C., and *Doyne*, for the appellants, contended that the use of the words "istimrari mokurruri" was sufficient in itself to denote an intention to convey an estate of inheritance, that is, the words imported perpetuity and hereditary succession. The Plaintiff has failed to shew that those words were used in any other than their natural and ordinary sense. It lay upon him to shew that that meaning was controlled in any way either by other expressions in the document or by the circumstances of the case. Reference was made to Regulation VIII. of 1793: *Toolseenurain Sahee* v. *Baboo Modnurain Singh* (1); *Ameeroonnissa Begum* v. *Hetnarain Singh* (2); *Joba Singh* v. *Meer Nujeeb Oollah* (3); *Wilson's* Glossary, "Mukarruri," p. 352; *Thakoor Munoorunjun Singh* v. *Rajah Leelanund Singh* (4); *Mussumat Lakhu Kowar* v. *Roy Hari Krishna Singh* (5); *Mussamut Bilasmoni Dasi* v. *Raja Sheopershad Singh* (6); *Baboo Dhunput Singh* v. *Gooman Singh* (7).

Cowie, Q.C., and *Woodroffe*, for the Respondent, were not called upon.

1885
June 17.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent (the Plaintiff in the suit) is the grandson of *Rajah Nirbhoy Singh*, who was the owner of the zemindary of *Gidhowr*, an ancient impartible estate, which descended according to the law of primogeniture. The Appellants (the Defendants) are the sons of *Kumar Sarnam Singh*, who married *Srimati Nawah Koeri*, one of the daughters of *Nirbhoy Singh*. In 1852 *Nirbhoy*

(1) S. D. A. 1848, p. 752.
(2) S. D. A. 1853, p. 649.
(3) 4 Sel. Rep. 271.
(4) 3 Suth W. R. 84, and on review 5 Suth W. R. 101; Law Rep. Ind. App. Supp. Vol. p. 181.
(5) 3 Beng. L. R. 226.
(6) Law Rep. 9 Ind. App. 33.
(7) 11 Moore's Ind. App. 434.

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Singh died, leaving one son, *Rajah Mohender Narain Singh*, who succeeded to the estate, and having had five daughters, two of whom died before him. *Nawah Koeri* died in 1844. *Rajah Mohender Narain Singh* died in 1869, leaving four sons, of whom the Plaintiff, *Ram Narain*, is the eldest, and two daughters. *Ram Narain* succeeded to the zemindary.

The only question in the suit is what is the construction of a pottah, granted on the 29th of August, 1850, by *Nirbhoy Singh* to his son-in-law, *Kumar Sarnam Singh*, of certain mouzahs which were part of the zemindary of *Gidhowr*. *Sarnam Singh* died on the 10th of June, 1878, and on the 29th of March, 1880, the Plaintiff filed his plaint to recover possession of the mouzahs, in which he alleged that the pottah was granted in lieu of a former pottah, dated the 11th Bysack 1254 Fusli (11th of April, 1847), which was granted in lieu of the first pottah, dated the 11th Cheyt 1239 Fusli (27th of March, 1832); that the first pottah was granted at a smaller jumma than that specified in the second, and was granted on account of paternal affection and kindness to *Sarnam Singh*, the husband of his daughter, for the assistance, maintenance, and support of his daughter and her husband; and that the pottah was to remain in force only during the lifetime of the grantee. The Defendants, in their written statement, alleged that *Sarnam Singh* was a member of a family of the *Rajpoot* caste, and *Nirbhoy Singh* was inferior to him in family and caste, and that on account of his marriage with *Nawah Koeri*, and of his living at *Gidhowr* with his wife and children, *Nirbhoy Singh* on the 11th Cheyt 1239 Fusli granted to him an istimrari mokurruri tenure, i.e. for perpetuity, at an annual jumma of Rs.201. They denied that the grant was for his lifetime, and submitted that it was for perpetuity to be enjoyed generation after generation. The pottahs of 1847 and 1850 are in the proceedings, but that of 1832 is not. By that of 1847 the annual jumma was raised from Rs.201 to Rs.651, for a reason which is there stated. That of 1850 was made to settle some dispute as to a word in that of 1847. It is not necessary to state the terms of either of these pottahs. They both contain the words "istimrari mokurruri," the meaning of which is disputed, and it appears from the recital in that of 1847 that the original pottah contained those words.

The case was heard in the first instance by the Subordinate Judge of *Bhagulpore*, who in his judgment, after stating that the issue was whether the pottah of 1850 to *Kumar Sanjam Singh*, the ancestor of the Defendants, was for life or for perpetuity to be enjoyed generation after generation, proceeded to refer to the decisions of the Sudder Dewany Adawlut, which are noted in the margin of the judgment. One of these was in 1848, another in 1853, and another in 1860. He says that it was held in these cases that in mokurruri deeds merely the use of the words "istimrari mokurruri," without any such words as "ba farzandan" (with children), or "naslan bad naslan" (generation after generation), or any similar words having the same meaning, will not signify perpetual tenure to be enjoyed by heirs; on the contrary, it will mean life interest. He then refers to two decisions of the High Court at *Calcutta*, which was established in 1862, when the Sudder Dewany Adawlut was abolished. The former of these was in 1869, and is reported in 3 Bengal Law Rep. 226. The latter was in 1877, and, not having been reported, an attested copy of the judgment is in the record of this appeal. These decisions are opposed to those of the Sudder Dewany Adawlut, the High Court holding that the words "istimrari mokurruri," without any others, must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee. With reference to these decisions, the Subordinate Judge seems to be of opinion that in 1850 the parties to the pottah must have known the meaning of the words "istimrari mokurruri" to be the same as was then held by the Sudder Dewanny Adawlut, i.e. for life, and as the pottah contained only those words, without any word to denote that it was for perpetuity to be enjoyed generation after generation, it was taken as a mokurruri for life. He then refers minutely to the documentary evidence. This consisted of mokurruris granted by *Nirbhoy Singh* to his three brothers, his brother-in-law, who married his only sister, and his five sons-in-law and two other relatives, and also of mokurruris granted by *Mohender Narain*. It is not necessary to refer to this evidence, as it can only prove a custom of the family of *Nirbhoy Singh*, and what was understood in his family to be the meaning of "istimrari mokurruri" when used without any other words. The effect of it is stated by the

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Subordinate Judge to be that when a pottah was granted to one of the male members of the family who would become heirs according to the Shastra, in addition to the words "istimrari mokurruri," the words "with children," or other words having similar meaning, were inserted; and when it was granted to a son-in-law or other relative, no other words but "istimrari mokurruri" were used. The Subordinate Judge concluded by finding that the pottah in this case created "a life mokurruri, and not a perpetual mokurruri to be enjoyed generation after generation," and made a decree in favour of the Plaintiff.

The Defendants appealed to the High Court at *Calcutta*. That Court in its judgment, after distinguishing the cases relied upon for the Defendants (and, their Lordships think, rightly), says that in the later years of the Sudder Dewany Adawlut it was repeatedly held that an istimrari lease conveyed no hereditary right, unless expressly given by such words as "ba farzandan" or "naslan bad naslan," but there have been cases in the High Court in which the words "mokurruri istimrari" were held to convey a hereditary right. It then refers to two cases before this Committee, and says, "It is therefore fully established at the present day that the words contained in the Defendants' pottah do not *per se* convey to them an estate of inheritance." And after referring to the evidence of the custom of the family, the Court dismissed the appeal.

It is necessary now to consider the decisions which have been referred to. The earliest reported case appears to be *Tulsee Narain Sahee* v. *Modnurain Singh* (1). There a mokurruri istimrari pottah had been executed in favour of two brothers, who were both dead, and the principal Appellant was the heir of both. He claimed to succeed to the possession of the lands, and the suit was brought to try the question. The Judge of the Sudder Dewany Adawlut said:—

"The principal Sudder Ameen, admitting the pottah to be genuine, has decided against the Appellants on the second plea of the Respondent, that the heir cannot claim what the deed guaranteed only to the individuals named in it. The decision is founded on the commonly understood purport of deeds so worded

(1) S. D. A. Rep. 1848, p. 752.

as shewn by precedents referred to in the judgment. It has been repeatedly ruled by the Courts generally that the permanence (istimrar) expressed in these pottahs has reference only to the term of existence of the grantee, and that to render them hereditary the addition of 'ba furzundan' (including children or descendants), or 'nuslun bâd nusl' (from generation to generation), is necessary. My own knowledge confirms the correctness of this, and upon this and the following precedents of the Court, amongst the many which doubtless might be produced, I affirm the decision appealed against."

Three precedents are then mentioned; one of the 27th of May, 1817, another of the 2nd of April, 1827, and a third of the 28th of September, 1835.

The next reported case is *Ameeroonnissa Begum* v. *Hetnarain Singh* (1). It is described as a suit to resume an istimrari mokurruri lease, on the grounds that the lease was not hereditary, and that, the original lessee being dead, his heirs had no right to retain the tenure, and it came before three Judges of the Sudder Dewany Adawlut. The judgment refers to the decisions of the 20th of September, 1835, and the 2nd of April, 1827, and says (p. 654):—

"The Appellant urges that the term 'mookururee' applies to the fixed amount of jumma, and 'istemraree' to the right of succession in perpetuity, or to the duration of the tenure. But such is not the interpretation of the term 'istemraree' according to local custom, as shewn by the decisions quoted, though the strict meaning of the word in lexicography certainly is 'perpetuation.'"

Another decision was on the 22nd of May, 1860, by three Judges of the Sudder Dewany Adawlut, two of whom became Judges of the High Court. An attested copy of the judgment is in the record. The suit related to the pottah granted by *Nirbhoy Singh* to his brother-in-law, *Kumar Dewan Singh*, and was brought against his son by *Mohendra Narain Singh*. It is said in the judgment that the Plaintiff set forth that his father, *Nirbhoy Singh*, on the 21st Kartick, 1213 F., gave to *Kumar Dewan Singh*, the father of the Defendant, a perpetual lease (mowrussi istimrari) of the villages *Jogi* and *Nirbund*, and on the death of the grantee

(1) S. D. A. Rep. 1853, p. 648.

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he claimed to resume possession. The Defendant answered that the deed under which he held was, as stated by the Plaintiff, one of the 21st Kartick, 1213, for a jumma of Rs.21, but that so far from being restricted to the life of the first grantee, it had in express words the terms "to sons and generation after generation, and descendants after descendants." The Principal Sudder Ameen held that the document put forth by the Defendant was not the genuine lease, and decreed for the Plaintiff. The judgment of the Sudder Dewany Adawlut, after deciding that the deed put in by the Defendant was not the real lease, says :—

"Lastly, it is urged that the plaint admits that a mowrussi istimrari lease was given to Defendant's father on the 21st of Kartick, 1213, and that as these terms are equivalent to hereditary and perpetual terms the lease must descend from father to son. But it has been definitely ruled in the case of *Ameerunnissa* (1) that an istimrari lease does not convey any hereditary right unless such terms as 'ba furzandan' or 'nuslan bàd nuslin' are contained in the body of the deed, and this precedent has always been followed."

The word "mowrussi" must be used by mistake for "mokurruri;" as there was evidence in the present suit that the grant by *Nirbhoy Singh* was an istimrari mokurruri, and the Principal Sudder Ameen in his judgment describes the claim as for recovery of possession by setting aside "the istimrari mokurruri sunnud."

The first decision of the High Court on this matter is in *Mussummat Lakhu Kowar* v. *Roy Hari Krishna Singh* (2). The suit was brought by the successor of the grantor of a mokurruri istimrari pottah against the widow of the grantee and others, the Plaintiff alleging that it was only a life tenure, and the Defendants that it was an hereditary tenure in perpetuity. The Sudder Ameen dismissed the suit on the ground that istimrari meant perpetuity and nothing else. On appeal to the Additional Judge of *Tirhoot* this decision was reversed, and the Defendant appealed to the High Court. The decision of the Sudder Court in 1853 was relied upon for the Respondent, but the Court said it was a very peculiar one, and proceeded to a considerable extent, at least, on evidence which tended to qualify the wording of the pottah, and

(1) S. D. A. Rep. 1853, p. 648. (2) 3 Beng. L. R. 226.

to shew that it was not intended to convey an hereditary title. They reversed the decision of the Additional Judge on the ground appearing in the following passage of the judgment which was delivered by one Judge, the other concurring:—

"Then as to the meaning of the words themselves. It cannot, I imagine, be for a moment contended that the words mokurruri istimrari do not in their lexicographical sense mean 'something that is fixed for ever.' No doubt there is a custom which adds to these words 'generation after generation,' but this is by no means an universal custom, and the extra words are etymologically redundant. Moreover, if the patta were merely for the life of the grantee, what could be easier than to say so, and what was the object of using words that could be applied in their ordinary sense only to hereditary rights? I should say that when a grantee holds under a patta worded in this way he has, at least, made out the very strongest *primâ facie* case, and that the *onus* of shewing that by the custom of the district pattas conferring hereditary title always contained and were obliged to contain the words 'ba-farzandan,' 'nashin bayd nashin,' or similar phrases, would be heavily upon the person seeking to set aside the lease."

The decisions of the Sudder Court previous to 1853 were not referred to. The ground of them appears to have been that the words, when used in a pottah, had a customary meaning. This is distinctly said in the case in 1853, p. 654. If this had been noticed it might have been thought that the customary meaning of the words, rather than the lexicographical, ought to be regarded, and the former would be their ordinary sense when used in a pottah.

In the other case in the High Court in 1877, this decision seems to have been treated as having settled the question. The Court say:—

"Having regard to the ordinary meaning of the words 'mokurruri istimrari,' and to the construction which this Court has put upon them in the case of *Mussammat Lukkhi Koer* v. *Roi Hurri Khrishna Singh* (1), it appears to us that an 'istimrari mokurruri' pottah containing no words of inheritance on the one hand, nor any words that the lessee is only to have an estate for life, on the

(1) 3 Beng. L. R. 227.

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other must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee."

In *Rajah Leelanund Singh* v. *Thakoor Munoorunjun Singh* (1), where the question was, whether certain ghatwali tenures, created before the permanent settlement, could be determined by a zemindar dispensing with the ghatwali services, this Committee said:—"The words 'mokurruree istemraree' are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted, or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary." The doubt thus stated is not removed by the lexicographical meaning of the words.

After this review of the decisions, their Lordships think it is established that the words "istimrari mokurruri" in a pottah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual. It was held by this Committee, in a case where the instrument was called "the mokurruri ijara pottah" (2), that this was the question. Such an intention was not shewn in this case, and in the argument before their Lordships the Appellant relied solely upon the terms of the pottah. As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal. The costs of it will be paid by the Appellant.

Solicitors for the Appellant: *Barrow & Rogers.*
Solicitor for the Respondent: *T. L. Wilson.*

(1) Law Rep. Ind. App. Supp. Vol. p. 181. (2) Law Rep. 9 Ind. App. 33.

SRIMATI KAMINI SOONDARI CHOWDHRANI . . . . . } DEFENDANT;

AND

KALI PROSUNNO GHOSE AND ANOTHER PLAINTIFFS.

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CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Jurisdiction—Powers of the Appellate High Court—Act VIII. of 1859, *s.* 12—*Exorbitant Interest—Unconscionable Bargain.*

A foreclosure suit relating to lands in the 24-Pergunnahs having been dismissed by the Court of the 24-Pergunnahs, and an action upon a covenant in a mortgage deed relating to lands in *Nuddea* having been dismissed by the Court of *Nuddea*, the High Court reversed the dismissal in the former case, affirmed it in the latter, and then turned both suits into a contribution suit and remanded it, with directions as to the mode in which contribution should be effected, to the Court of the 24-Pergunnahs :—

Held, that this was *ultrà vires*. Neither under sect. 12 of Act VIII. of 1859 or otherwise could the High Court in its appellate jurisdiction give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in *Nuddea* relating to lands in *Nuddea*. Neither does the Procedure Code empower the High Court without consent of parties to change two suits, one of which it has itself dismissed, into one suit of a totally different description from either of them :—

Held, that the charge of exorbitant interest by a mooktar to a purdanashin, the security being ample, amounts to a hard and unconscionable bargain against which equity will relieve.

Beynon v. *Cook* (1) approved.

CONSOLIDATED appeals from two decrees of the High Court (July 20, 1878, and June 27, 1881).

The Respondents *Kali Prosunno Ghose* and another sued on the 24th of April, 1875, in the Court of the 24-Pergunnahs for possession of certain properties and for the declaration of their right to another property; alleging that these properties had been mortgaged to their vendor by the Appellant and that the mortgagor had been foreclosed under Regulation XVII. of 1806.

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Law Rep. 10 Ch. Ap. 391.

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On the 7th February, 1876, the Respondents sued in the Court of the Subordinate Judge of *Nuddea* to recover Rs.63,394, alleged to be due under another mortgage deed.

These suits were dismissed by the respective Courts on the 29th of February, 1876, and 1st of March, 1877.

The Respondents appealed in both suits.

The High Court (*Garth*, C.J., and *M'Donell*, J.) on the 20th of July, 1878, affirmed the dismissal of the suit in the *Nuddea* Court. In the other appeal it decreed, amongst other things, that the properties mortgaged by both deeds, except *Chapra*, be valued by the Lower Court, and that the debts due under the two deeds be apportioned amongst the several mortgaged properties in proportion to their respective values.

The Appellant appealed to Her Majesty in Council.

Pending the appeal, the Subordinate Judge apportioned the mortgage debt amongst the several mortgaged properties, and in appeal the High Court on the 27th of June, 1881, decreed that the first Respondent was entitled to certain specified sums (therein stated to be the proportion of the principal amounts chargeable against the mortgaged properties other than *Alumpur* and *Chapra*) with interest and costs, to re-convey if paid, otherwise that the properties except *Alumpur* and *Chapra* should be sold, "the money to arise from such sale to be applied in payment of the amount due to the Respondent, the residue, if any, to the Appellant and another in proportion to the value of the mortgaged properties held by them respectively, and that if such sale proceeds were not sufficient for the payment in full of the amount payable to the Respondent, he should be at liberty to realize the amount of such deficiency from the Appellant personally, or from her properties other than those mortgaged."

The facts are stated in the judgment of their Lordships.

The material portion of the High Court's judgment of the 20th of July, 1878, is as follows:—

"We consider that the view which the Lower Court has taken of these cases is not altogether correct.

"In the first place, the Subordinate Judge was wrong in supposing that by taking an assignment of the mortgages, *bonâ fide* in the name of a trustee, the Plaintiff could not prevent the

merger of the mortgagors' and mortgagees' interests, and consequently the extinguishment of the mortgage debt.

"The assignment was taken in the trustee's name expressly for the purpose of preventing the merger and keeping alive the two estates, and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature: *Watts* v. *Symes* (1) and *Adams* v. *Angell* (2).

"The real objection to these suits, in an equitable point of view, appears to us to be this: That the Plaintiff, who is the beneficial owner of *Alumpur*, subject to the mortgages, and as such liable, conjointly with the owners of the other mortgaged properties, to pay his proportion of the entire mortgage debts, has attempted to foreclose *Alumpur* and the other properties comprised in the first mortgage for a part only of the mortgage debts (that part which was due under the first mortgage), and has then sued the Defendant personally for the remainder, to the payment of which he himself, as the owner of *Alumpur*, is bound to contribute. We have great doubt whether, under such circumstances, he had any right to foreclose at all under the first mortgage. *Grish Chunder*, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage debt; and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage, and so deprive the Defendant of that which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage.

"But even assuming for the sake of argument that the Plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right (being himself the beneficial owner of *Alumpur* and as such liable to contribute proportionately to the payment of both mortgages), to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the Defendant personally for the debt due upon the second mortgage as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it.

(1) 1 D. M. & G. 240. (2) 5 Ch. D. 634.

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"Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit, and that the bringing of that suit had the effect (by analogy to the English rule of equity in such cases), &c., of re-opening the foreclosure or preventing the foreclosure proceedings being confirmed or sanctioned by this Court, and of enabling us to make a decree which will at once secure to the Plaintiff his just rights, and at the same time oblige him to do equity as regards the Defendant."

Woodroffe, for the Appellant, contended that no decree for apportionment could be made in the suits before the High Court. The Court had virtually altered the whole frame of the suits. Further, there cannot be a decree for money where the suit is for foreclosure under Regulation XVII. of 1806: *Macpherson* on Mortgages, 6th ed. p. 232; *Mohanund Chutturjea* v. *Govindnath Ray* (1); *Zalem Roy* v. *Deb Shahee* (2). A decree for apportionment could not properly be made in the suits as they were actually presented in appeal to the High Court. In dealing with the suits as it did, the High Court virtually altered the frame of them, and in effect the claims made, and this it had no power to do. Even if the mortgage was not fraudulent, it was unconscionable, and such as the Court would relieve against. Reference was made to *Gokuldoss* v. *Kriparam* (3); *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (4); *Nawab Azimut Ali Khan* v. *Jowahir Singh* (5); *Earl of Aylesford* v. *Morris* (6); *Nevill* v. *Snelling* (7); *Bhuggobutty Dossee* v. *Shamachurn Bose* (8); *Maharani of Burdwan* v. *Srimati Baradasundari Debi* (9).

Cowie, Q.C., and *Doyne*, for the Respondent *Kali Prosunno Ghose*, contended that the frame of the suits was not so materially altered as to be in excess of the powers of the Court under the *Procedure Code*. They were in effect suits for possession supplemental to the relief obtainable under Regulation XVII. of 1806. No

(1) 7 Sel. Rep. 92.
(2) Marshall's Rep. 167.
(3) 13 Beng. L. R. 205.
(4) 11 Moore's Ind. Ap. Ca. 241.
(5) 13 Moore's Ind. Ap. Ca. 408.
(6) Law Rep. 8 Ch. 484.
(7) 15 Ch. D. 702.
(8) Ind. L. R. 1 Calc. 337.
(9) 1 Beng. L. R. F. B. 31, 32.

objection had been made by the Appellant to the suits being treated as one. She was not surprised or prejudiced in any way. Large powers of amendment of pleadings and of raising fresh issues were possessed by the Court, and what had been actually done was no more than the equivalent of what might have been done more formally: Act VIII. of 1859, sects. 350–4. The High Court was right in deciding that the Appellant was bound in equity to contribute to the payment of the total mortgage debt in proportion to the relative value of the mortgaged properties which he claimed to retain.

Woodroffe, in reply, contended that a decree of dismissal, when affirmed in appeal, cannot be afterwards altered by the High Court with a view to doing justice between the parties. As regards the second suit, the lands comprised therein were not in the same district with those comprised in the first suit; and the High Court in its appellate jurisdiction could not authorize the Court in the first suit to entertain the second. With regard to the rate of interest, it was an unconscionable bargain, in which undue advantage was taken of a purdanashin by her mooktar. Reference was made to *Beynon* v. *Cook* (1); *Gooroo Doss Dutt* v. *Oomachurn Roy* (2); *Lall Beharee Awustee* v. *Bholanath Dey Chakladar* (3); *Deen Dyal Lall* v. *Choa Singh* (4); *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (5); *Greesh Chunder Lahoree* v. *Bhuggobutty Debia* (6); *Ashgar Ali* v. *Delroos Banoo Begum* (7); *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (8).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

These appeals are brought from two judgments of the High Court of *Calcutta*; the first interlocutory, dated the 20th of July, 1878, the second final, dated the 27th of June, 1881, in a suit in

(1) Law Rep. 10 Ch. 389.
(2) 22 Suth. W. R. 525.
(3) 23 Suth. W. R. 49.
(4) 25 Suth. W. R. 189.
(5) 11 Moore's Ind. Ap. Ca. 551, 574.
(6) 13 Moore's Ind. Ap. Ca. 419.
(7) Ind. L. R. 3 Calc. 327.
(8) Law Rep. 1 Ind. Ap. 192.

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which the Respondents were the Plaintiffs, and the Appellant the Defendant.

The circumstances which gave rise to the suit, as far as they are material, are as follows:—*Mussumat Kamini* (by this short name it may be convenient to designate her) a purdanashin lady, executed a kut-kobala of the moiety of five mouzahs, the largest and most valuable of which was named *Alumpur*, to which she was entitled as widow of *Ram Chunder Pal Chowdhry*, to secure the repayment, within one month, of Rs.12,000, with interest at the rate of 4 per cent. per mensem until repayment, in favour of *Grish Chunder Bandopadhya*, who was the benamidar of *Hari Churn Bhose*, her mooktar.

One of these mouzahs, being subject to a prior mortgage, has been put out of the question; thus the mouzahs mortgaged may be treated as four.

On the 9th of May, 1872, the same lady executed another kut-kobala in favour of the same person, whereby the said four mouzahs, together with three others, were hypothecated to secure the repayment, in April, 1873, of Rs.24,000, with compound interest at 2·4 per mensem (27 per annum), calculated at quarterly rests.

On the 29th of June, 1873, a notice of foreclosure was served under the first mortgage.

On the 23rd of March, 1874, *Kali Prosunno Ghose* (the first Respondent) purchased on sale for arrears of revenue the interest of *Mussumat Kamini* in mouzah *Alumpur*. It may be here observed that, on the adequacy of the price given by him (Rs.70,000) being questioned by the revenue authorities, he represented, by petition, that the mouzah was subject to incumbrances to the amount of Rs.105,000, which he would be liable to discharge.

On the 3rd of June, 1874, *Grish Chunder* assigned for Rs.83,910 10*a*. 9*p*. all his interest under the two kut-kobalas to the second Respondent upon trust to prevent the merger of his rights under them, and to keep them alive for the benefit of the first Respondent, and empowered him to continue and prosecute the pending foreclosure proceedings, and the name of the first Respondent was substituted for that of *Grish Chunder* in the foreclosure proceedings.

On the 24th of April, 1875, being more than twelve months after the notice of foreclosure had been given by *Grish Chunder*, the Respondents filed their plaint in the present suit in the Court of the Subordinate Judge of the 24-Pergunnahs.

That plaint, which relates only to the first mortgage, after stating the facts above recited, prays for an order giving to Plaintiff No. 1 (*Prosuno Ghose*) a proprietary right based upon foreclosure in the three mouzahs other than *Alumpur*, and with respect to *Alumpur* for a declaratory decree confirming his possession of it, on a right derived from foreclosure of mortgage.

The Defendant, by her written statement, alleged (among other things) that the mortgage had been obtained from her by fraud, denied the right of the Plaintiffs to foreclose the mortgage, and asserted that if he had any claim it was to bring a contribution suit. While this suit was pending, on the 7th of February, 1876, the Plaintiffs brought another suit in the Court of the Subordinate Judge of *Nuddea*, in which the three additional mouzahs mortgaged by the second kut-kobala are situated, against the Defendant, to recover the principal and interest under that kut-kobala. We have not the plaint in this suit in the record, but it must be taken that the claim was against the Defendant personally.

The Subordinate Judge of the 24-Pergunnahs, finding against the allegation of fraud, dismissed the first suit on the ground that by the Plaintiffs' purchase of *Alumpur*, coupled with the assignment which he took of the rights of the mortgagee, the whole mortgage debt became extinguished, a ground of decision manifestly wrong, and properly reversed by the High Court.

The second action was dismissed by the Judge of *Nuddea*, mainly on the ground that the second kut-kobala did not give a personal remedy against the Defendant.

This judgment was affirmed by the High Court. The former judgment was varied in a manner which will be hereafter described.

It is convenient here to consider what were the rights of the parties, and what were the judgments which the Lower Courts ought to have pronounced.

The object of the Plaintiffs in bringing the separate suits in

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different jurisdictions seems to have been to foreclose the four mouzahs, including *Alumpur*, under the first mortgage only, whereby *Prosunno Ghose* would obtain the mouzahs in respect of a comparatively small debt, and freed from any liability to contribute to the payment of the second mortgage, and he would obtain an absolute estate in *Alumpur*, subject to an incumbrance amounting, not to Rs.105,000 as he had represented to the Board of Inland Revenue, but probably to something less than Rs.20,000.

He relied on the second mortgage for procuring the whole sum thereby secured by a personal remedy against Defendant, *i.e.* against the mortgaged property and any other she might have.

In their Lordships' opinion the Plaintiffs had no right to claim *Alumpur*, or the three other mouzahs, by foreclosure.

The Defendant could not have redeemed the three other mouzahs without their liability under the second mortgage being taken into account, nor could the Plaintiffs foreclose them under the first mortgage only, thus depriving the second mortgage of their contribution. With respect to *Alumpur*, he, having purchased the equity of redemption, was bound to contribute to the payment of both the mortgages in the proportion of the value of *Alumpur* to the other properties, and he could not free himself from this obligation by foreclosing *Alumpur* under the first mortgage only. Their Lordships are therefore of opinion that his suit was rightly dismissed, though not for the reason given by the Subordinate Judge.

The judgment dismissing the second suit having been affirmed, and no cross appeal having been presented, it cannot now be questioned.

The Appellant, therefore, had a right to judgment in both suits.

This being so, we now come to the manner in which the High Court dealt with the case, in the single desire, their Lordships doubt not, to do what they deemed complete justice between the parties.

Having affirmed the decree of dismissal in the second suit, whereby it was ended, they in some sense revive it, and turn both

suits into a contribution suit, which they send by way of remand to the Court of the 24-Pergunnahs. They observe :—

"We think, therefore, that, under the circumstances, the proper decree in both suits will be,—

"1st. That the first suit be dismissed, except as regards *Alumpur;* and that the Plaintiff's right to *Alumpur* be decreed, the Plaintiff No. 1 and the Defendant being subjected to the following conditions :—

"2nd. That, as between the Plaintiff No. 1 and the Defendant, the properties mortgaged by both deeds (except *Chapra*) be valued by the Lower Court.

"3rd. That the debt secured by the first mortgage be borne by the Plaintiff No. 1 and the Defendant, in the proportion of the aggregate values of the properties *Kachiaria, Atghara,* and *Dariapur* to the value of *Alumpur.*

"4th. That the debt secured by the second mortgage be borne by the Plaintiff No. 1 and the Defendant, in the proportion of the aggregate values of all the properties mortgaged by that deed (except *Chapra*) to the value of *Alumpur.*

"5th. That the Defendant be at liberty to redeem all the properties except *Alumpur,* upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to *Alumpur,* until fresh proceedings for foreclosure or for sale of the mortgaged properties (except *Alumpur*) shall have been taken in due course by the Plaintiff.

"6th. That until the mortgaged debts and interest shall be fully satisfied the said mortgaged properties in the hands of the Defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay.

"7th. That each of the parties do bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the Plaintiff No. 1."

To this judgment it is objected,—

1st. That the High Court, in their appellate capacity, had no power to confer on the Court of the 24-Pergunnahs

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jurisdiction to deal with a suit in the *Nuddea* district relating to property situated in *Nuddea*.

2nd. That to change the two suits into one contribution suit was beyond their power.

The case of property the subject of suit being situated in two jurisdictions is thus provided for in Act VIII. of 1859, the Act governing the procedure in this action. Sect. 12 is in these terms:—

"If the property be situate within the limits of different districts, the suit may be brought in any Court otherwise competent to try it within the jurisdiction of which the land or other immovable property in suit is situate, but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed in the same."

This section, in their Lordships' judgment, is not applicable to the circumstances of this case. Neither suit comprised the whole property, nor did either District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The Plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions.

Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in *Nuddea* relating to lands in *Nuddea*.

It may be observed that the Court of the 24-Pergunnahs dealt with *Alumpur*, which is in *Nuddea*, and that the Court of *Nuddea* dealt with the three mouzahs twice mortgaged, which were in the 24-Pergunnahs. The Defendant, who succeeded in both suits, raised no question upon this, and each of the district Courts must be taken to have tried the whole suit before it by consent. But the order of the High Court now appealed against can in no sense be deemed to have been made by consent.

With respect to the second objection, their Lordships, while fully recognising the advantages to the administration of justice of the wide powers of amendment and modification of decrees, and of framing new issues, conferred upon the High Court by sects. 350, 351, 352, 353, 354, and being by no means disposed to narrow

their plain meaning by judicial construction, are nevertheless of opinion that to change (as has been done in this case) two suits, one of which had been dismissed on appeal, into one suit of a totally different description from either of them, and this without consent, exceeds the powers conferred by the Act.

It follows that the judgment of the 20th of July, 1878, must be reversed. If so, all that followed on that judgment, the remand, and subsequent judgment of 1881 will fall to the ground, and the judgment of the district Courts respectively dismissing both suits will be affirmed. The Defendant should have her costs in the High Court as well as in the lower Courts, and the costs of this appeal. Their Lordships will humbly advise Her Majesty to this effect.

This view of the case makes it unnecessary to determine a question which has been argued at the bar, viz., whether the Defendant can be relieved from the exorbitant rates of interest stipulated for in the mortgages; but as unfortunately further litigation with respect to the mortgages seems not improbable, their Lordships think it may be useful to intimate the view that they are disposed to take of this question.

The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction.

But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against.

The doctrine of equity on this subject was laid down by the Master of the Rolls in *Beynon* v. *Cook* (1), and his judgment was affirmed by the Court of Appeal.

Rhys Beynon was a reversioner or remainderman, *Cook* was a money lender who took from him a promissory note for £100, for which he was charged £15 discount for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed, "The point to

(1) Law Rep. 10 Ch. 391.

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be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges."

This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a purdanashin lady; the lender, her own mooktar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances.

Solicitors for the Appellant: *Lambert, Petch & Shakespear.*
Solicitors for *Kali Prosunno Ghose: Barrow & Rogers.*

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ACT XL. OF 1858, s. 18.] Where an order of Court under sect. 18, Act XL. of 1858, empowering a guardian to mortgage certain immoveable property of a minor, omitted to specify the rate of interest at which she was at liberty so to do, *held*, that the proper or most favourable construction of the order was, that it authorized a loan at a reasonable rate of interest, and consequently that the High Court was right, there being no proof of necessity or expediency, in decreeing interest at 12 per cent. instead of 18 per cent., as stipulated in the mortgage bond which the guardian had executed. GUNGAPERSHAD SAHU *v.* MAHARANI BIBI - - - - - - - 47

ACT VIII. OF 1859, s. 7.] Sect. 7 of Act VIII. of 1859 does not say that every suit shall include every cause of action, but that it shall include the whole of the claim arising out of the cause of action.—Where therefore a plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession, and afterwards sued to recover from the same Defendant moveable property in consequence of its wrongful detention:—*Held*, that the causes of action were distinct, and that sect. 7 did not apply.—*Moonshee Buzlor Ruheem* v. *Shumsoonnissa Begum* (11 Moore's Ind. Ap. Cas. 553) followed. RAJAH OF PITTAPUR *v.* SRI RAJAH VENKATA MAHIPATI SURYA - - - - - - 116

—— **s. 2**: *See* RES JUDICATA.

—— **s. 12**: *See* JURISDICTION.

ACT IX. OF 1871, Sched. ii., Arts. 65, 132.] Where a mortgagee sued in covenant and also to enforce his mortgage security, *held*, that under Act IX. of 1871, sched. ii., art. 65, the personal remedy was barred in three years, but that art. 132 of the same schedule provided a limitation of twelve years as against the mortgaged property. RAMDIN *v.* KALKA PERSHAD - 12

ACT III. OF 1877, s. 49: *See* LAW OF REGISTRATION.

ACT X. OF 1877, s. 13: *See* ESTOPPEL.
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ACT XV. OF 1877, Art. 144: *See* GHATWALI TENURES.

ADOPTED SON NOT HEIR TO COLLATERAL IF ADOPTED AFTER HIS DEATH.

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"ALWAYS AND FOR EVER" NEED NOT DENOTE MORE THAN LIFE INTEREST: *See* MAHOMEDAN WILL.

APPORTIONMENT: *See* MORTGAGOR AND MORTGAGEE.

AWARD.] Where two parties had signed a general reference to arbitrators to decide between them upon their respective rights, and on the face of the award it appeared that the arbitrators had inquired into the matters referred, and no ground appeared for saying that they had misconducted themselves or made any mistake in conducting the inquiry:—*Held*, that the award was binding. RANI BHAGOTI *v.* RANI CHANDAN - - 67

BA FARZANDAN: *See* CONSTRUCTION. 2.

CONSTRUCTION.] In construing any instrument it must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. Where a mortgage deed gave an absolute power to the mortgagee to take possession of the whole mortgaged property on non-payment of an instalment when due, and contained another clause directing instead a sale of a sufficient portion to realize the amount thereof, and it appeared that the latter clause could be referred to a contingency, so as not to conflict with the absolute power previously given, *held*, that it must be so construed. DEPUTY COMMISSIONER OF RAE BARELI *v.* LAL RAMPAL SINGH - - - - - - 1

—— *See* HINDU LAW.

—— *See* HINDU WILL.

—— *See* MAHOMEDAN WILL.

2. —— The words "istimrari mokurruri" in a pottah do not *per se* import an estate of inheritance.—But the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, may shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual.—The words "ba farzandan" or "naslan bad naslan" are not essential to convey an hereditary right. TOOLSHI PERSHAD SINGH *v.* RAJAH RAM NARAIN SINGH - - - - 205

ESTOPPEL.] In a former suit between the same parties, but relating to different property, an issue as to the fact of an adoption was heard and decided:—*Held*, that sect. 13 of the Civil Procedure Code, 1877, barred the trial of that issue in the present suit. An estoppel is binding notwithstanding that the suit which raises it relates to a different property.—Costs occasioned by the introduction into the record of unnecessary and irrelevant matter disallowed. RAJAH OF PITTAPUR *v.* SRI RAJAH ROW BUCHI SITTAYA GARU - 16

EXORBITANT INTEREST: *See* JURISDICTION.

FORGERY: *See* PRINCIPAL AND AGENT.

GHATWALI TENURES.] In a suit by a ghatwal to eject the Defendants from a subordinate tenure within the ambit of the ghatwali estate on the ground that the tenure was at will only, it appeared that the father of the Plaintiff had obtained a decree against the Defendants, awarding to him the whole of the compensation money paid in respect of land formerly included within the tenure in suit, on the ground that the Defendants were merely tenants at will:—*Held*, that this was *res judicata* in the Plaintiff's favour under Act X. of 1877, sect. 13:—*Held*, further, that possession of such a tenure is not adverse to the ghatwal within the meaning of Act XV. of 1877, art. 144, until some definition or assertion of adverse right has been made between the parties, which in this case was within the statutable period. TEKAIT RAM CHUNDER SINGH *v.* SRIMATI MADHO KUMARI [188

HINDU LAW.] *Held*, with regard to the origin and history of a family, whose estate was in dispute, that although they affected to be Hindus, they were not governed by Hindu law, but had retained and were governed by family customs which, as regards some matters, were at variance with that law.—*Held*, further, upon the evidence, that the Hindu custom of succession by adoption had not been introduced into it. The *onus probandi* lay on those who alleged the custom, whereas, if the family had been subject to Hindu law the *onus* would have lain on those who alleged its exclusion.—The ruling in *Rajah Bishnath Sing* v. *Ram Churn Majmoadar* (Beng. S. D. A. (1850), p. 20), that even in a Hindu family there may be a custom which bars inheritance by adoption, approved.—*Held*, that on the true construction of an angikar-patra, whereby the deceased purported to give his property to the respondent "by virtue of his being his adopted son," inasmuch as the adoption was invalid the gift did not take effect.—*Nidhoomoni Debia* v. *Saroda Pershad Mookerjee* (Law Rep. 3 Ind. Ap. 253) distinguished. FANINDRA DEB RAIKAT *v.* RAJESWAR DASS - - - 72

2. —— According to Hindu law an adoption after the death of a collateral does not entitle an adopted son to come in as heir to the collateral.—An adoption having through the fraud of the Defendant been delayed till after the death of the collateral, the Defendant succeeded to the exclusion of the adopted son:—*Held*, that as the latter was unborn at the death of the collateral he had no remedy, since he could not under any circumstances have succeeded. BHUBANESWARI DEBI *v.* NILKOMUL LAHIRI - - - 137

3. —— A Hindu gave to his two widows the following power: "You *S.*, the elder widow, may adopt three sons successively; and you *B.*, the younger widow, may adopt three sons successively":—*Held*, that this did not, on its true construction, purport to authorize a simultaneous adoption:—*Held*, also, that Hindu law does not allow simultaneous adoptions. AKHOY CHUNDER BAGCHI *v.* KALAPAHAR HAJI - - 198

HINDU WILL.] Where it clearly appeared that a Hindu testator's intention was that his estate itself should not be disposed of, but to make a gift simply with reference to the enjoyment of the profits, the object being to create a perpetuity as regards the estate, and to limit for an indefinite period the enjoyment of the profits of it:—*Held*, that by Hindu law the whole will was invalid. SOOKHMOY CHUNDER DASS *v.* SRIMATI MONOHURRI DASI - - - - - - 103

INDIAN EVIDENCE ACT (I. OF 1872), SECT. 32.] Where in order to prove a family pedigree a deposition of a deceased mooktar was tendered, but it appeared that he had no special means of knowledge, in fact no other means of knowledge but as mooktar, that he was not a member of the family, or intimately connected with it:—*Held*, that it was not admissible under Act I. of 1872, sect. 32. THAKUR SANGRAM SINGH *v.* MUSSUMAT RAJAN BAI - - - - - - 183

INVALIDITY OF GIFT TO ADOPTED SON WHEN ADOPTION FAILS: *See* HINDU LAW. 1.

"ISTIMRARI MOKURRURI": *See* CONSTRUCTION. 2.

JUDGMENT MUST BE CONFINED TO THE POINTS IN ISSUE: *See* PRACTICE OF THE COURT.

JURISDICTION.] A foreclosure suit relating to lands in the 24-Pergunnahs having been dismissed by the Court of the 24-Pergunnahs, and an action upon a covenant in a mortgage deed relating to lands in *Nuddea* having been dismissed by the Court of *Nuddea*, the High Court reversed the dismissal in the former case, affirmed it in the latter, and then turned both suits into a contribution suit and remanded it, with directions as to the mode in which contribution should be effected, to the Court of the 24-Pergunnahs:—*Held*, that this was *ultrà vires*. Neither under sect. 12 of Act VIII. of 1859 or otherwise could the High Court in its appellate jurisdiction give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in *Nuddea* relating to lands in *Nuddea*. Neither does the Procedure Code empower the High Court without consent of parties to change two suits, one of which it has itself dismissed, into one suit of a totally different description from either of them.—*Held*, that the charge of exorbitant interest by a mooktar to a purda-nashin, the security being ample, amounts to a hard and unconscionable bargain against which equity will relieve.—*Beynon* v. *Cook* (Law Rep. 10 Ch. Ap. 391) approved. SRIMATI KAMINI SOONDARI CHOWDHRANI *v.* KALI PROSUNNO GHOSE - 215

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LAW OF LIMITATION. (1.) *Held*, that the Plaintiff having been excluded to his knowledge from his share of alleged joint property for more than twelve years, his suit was barred by the *Limitation Act* of 1877, c. 127, Schedule II. RAI RAGUNATH BALI *v.* RAI MAHARAJ BALI - 112

LAW OF LIMITATION—*continued.*

2. —— *Held*, that Act XV. of 1877, sect. 10, does not apply to the Government in possession of an estate in their own right under a claim of forfeiture arising from the conviction of the last holder, and not as trustee for a specific purpose. ZEMINDAR OF PALCONDAH *v.* SECRETARY OF STATE FOR INDIA - - - - - 120

—— *See* ACT IX. OF 1871.

LAW OF REGISTRATION.] Where a deed of conveyance, executed in 1873, but unregistered, was inadmissible in evidence under sect. 49 of Act III. of 1877, *held*, that a registered deed of conveyance, executed in 1878, and confirming the unregistered deed of 1873, operated to pass the property.—The grantee under that deed having paid the consideration money, and being shewn to be the true owner, the High Court was wrong in holding that his son, having been allowed to be in possession, with or without payment of rent, must be treated as owner, or that otherwise the provisions of the Registration Act would be defeated. MITCHELL *v.* MATHURA DASS - 150

MAHOMEDAN LAW.] Mahomedan Law does not recognise vested estates in remainder.—Where a deed of compromise between a Mahomedan widow and the sons of her deceased husband stipulated that the former should remain proprietor, and that the latter should be entitled to succeed, *held*, that the title to succeed must be contingent upon the sons surviving the widow, and that it would be opposed to Mahomedan Law to hold that the deed created in them vested interests which passed to their heirs on their death in the lifetime of the widow. ABDUL WAHID KHAN *v.* MUSSUMAT NURAN BIBI - - 91

MAHOMEDAN WILL.] The Defendant having claimed to retain exclusive possession of the property in suit subject to the conditions of a will and in order to carry out its provisions:—*Held*, that, although by the will the management of the said property was given to the Defendant's father "always and for ever," that expression did not *per se* extend the interest beyond the life of the person named:—*Held*, further, that on the true construction of all the provisions in the will, the Plaintiff was entitled to the shares given her in full proprietary right, notwithstanding an attempt in the will to control her in the disposition thereof and to prevent her parting with them to strangers. MOULVI MUHAMMAD ABDUL MAJID *v.* MUSSUMAT FATIMA BIBI - - - - - 159

MORTGAGOR AND MORTGAGEE.] A purchaser of a portion of mortgaged property who as Defendant in a foreclosure suit sets up a title paramount to the mortgagee, and is on his own prayer dismissed with costs as having no title to redeem:—*Held*, overruling the High Court, to be bound by such order and incapable thereafter of claiming to redeem.—*Held* further, overruling the High Court, that the proportion of mortgage charge payable by the purchaser of a fragment of an equity of redemption cannot be ascertained in the absence of the purchasers of other fragments, or by taking an account as between himself and the mortgagee alone. Still less can such a purchaser, without any accounts being taken at all, be decreed possession of his fragment of the mortgaged property, clear of the proportion of mortgage money chargeable thereon, on payment to the mortgagee of the sum for which on the disclaimer of the purchaser he (the mortgagee) himself bought in the selfsame equity of redemption. NILAKANT BANERJI *v.* SURESH CHUNDER MULLICK - - - 171

MORTGAGOR AND MORTGAGEE—*continued.*

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OUDH CONFISCATION.] *Held*, with regard to a property which had been confiscated by Lord *Canning* in 1858, the confiscation having been subsequently annulled without any intention on the part of the Government to make a grant in favour of any person, that it must be treated as if there had never been any confiscation at all. Consequently a title thereto accrued or possession thereof enjoyed prior to the confiscation could be used to defeat an adverse claim. PRINCE MIRZA JEHAN KADR BAHADOOR *v.* NAWAB BADSHOO BAHOO SAHIBA - - - - 124

OUDH SUB SETTLEMENT ACT, 1866.] Where the relationship of landlord and tenant is established, the tenant cannot defeat the landlord's right of resumption upon proper notice on the ground that time and undisturbed enjoyment has ripened his holding into a species of ownership or that he has acquired by prescription a holding such as to entitle him to an under-proprietary right. He must allege and prove his right to remain undisturbed. THAKUR ROHAN SINGH *v.* THAKUR SURAT SINGH - - - 52

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PRACTICE.] Case in which it was held that a decree of a District Judge was on its true construction rightly treated as his decree, though in some of its terms it purported to amend a decree of the Subordinate Judge, and was rightly carried into execution by the District Judge. His jurisdiction so to do could not properly be questioned on a mere application to him for postponement of an execution sale.—Costs occasioned by the introduction of unnecessary and irrelevant matter into the record disallowed. BISHENMUN SINGH *v.* LAND MORTGAGE BANK OF INDIA - - - 7

PRACTICE OF THE COURT.] In a suit to set aside certain orders of the collector, and for registration of the Plaintiff's name in zemindari right after cancelling those of the Defendants, the latter set up forged deeds in support of their alleged zemindari right. The High Court, thereupon, while decreeing for the Plaintiff, declared that the Defendants were putnidars, founding this declaration upon certain statements in the Plaintiff's documentary evidence, no such claim having been put forward by the Defendants, and no issue to that effect having been raised:—*Held*, that the High Court had no power to make such declaration.—Sect. 566 of Act X. of 1877 does not apply where an issue has not been raised in the lower Court. OFFICIAL TRUSTEE OF BENGAL *v.* KRISHNA CHUNDER MOZOOMDAR - - 166

PRINCIPAL AND AGENT.] The Defendant, as Sudder treasurer, gave to the Government the following engagement in respect of its darogah of stamps appointed as his agent: "Should any loss or deficiency arise from the non-production of accounts, or by misconduct or negligence, ... I hold myself responsible to make good such loss." —It appeared that the darogah, in collusion with the licensed vendors of stamps, forged stamps and accounted for their proceeds to the Government, while he misappropriated the proceeds of an equivalent amount of genuine stamps entrusted to him by the Treasury:—*Held*, that, although the Defendant was not responsible in respect of the forgery committed, yet he was so for the misappropriation and false accounts of his agent; and that the losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by reason of the misappropriation and the false accounts. SRI KISHEN *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL [142

PURCHASE OF A PORTION OF MORTGAGED PROPERTY: *See* MORTGAGOR AND MORTGAGEE.

RES JUDICATA.] In a suit by a Hindu in the Court of the subordinate Judge of the district against his deceased brother's widow to recover the estate of the deceased in her possession, where the issue was as to separate or joint ownership of the brothers, *held*, that the grant of a certificate to the widow under Act XXVII. of 1860, after a determination of the issue as above against the surviving brother, being a proceeding of representation, not otherwise of title, did not constitute *res judicata* in her favour.—*Held*, further, that a similar determination of the said issue on the intervention of the Plaintiff in a rent-suit brought

RES JUDICATA—*continued.*

by the widow in the Moonsiff's Court, did not, under Act VIII. of 1859, s. 2, constitute *res judicata* in her favour, the said Court being one of a limited jurisdiction, and not concurrent with that of the Subordinate Judge.—*Krishna Behari Roy* v. *Brojeswari Chowdranee* (Law Rep. 2 Ind. App. 285) followed.—Act X. of 1877, s. 13, is to the same effect, and does not alter the previous law.—The decree of the High Court being erroneously in the widow's favour on the ground of *res judicata*, a cross-appeal by her against a finding in the judgment in favour of joint ownership was unnecessary to enable her to defend her decree on the ground that the Court ought to have decided on the merits in her favour. RAJAH RUN BAHADOOR SINGH *v.* MUSSUMUT LACHOO KOER 23

—— *See* GHATWALI TENURES; MORTGAGOR AND MORTGAGEE.

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RIGHT OF RESUMPTION: *See* OUDH SUB-SETTLEMENT ACT, 1866.

SEPARATE CAUSES OF ACTION: *See* ACT VIII. OF 1859.

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SUITS RELATING TO DIFFERENT ESTATES: *See* ESTOPPEL.

UNCONSCIONABLE BARGAIN: *See* JURISDICTION.

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